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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 953.

THE MAINE CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MAINE.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MAINE.

FILED OCTOBER 26, 1877.

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1 STATE OF MAINE,
Cumberland, ss:

At the supreme judicial court which was begun and held at Portland, within and for the county of Cumberland, on the second Tuesday of April, being the tenth day of said month, anno Domini 1877.

Present, Hon. William G. Barrows, justice.

THE STATE OF MAINE, PLAINTIFF,
versus
THE MAINE CENTRAL RAILROAD COMPANY, a corporation existing under the laws of the State of Maine, and having its place of business at Portland, in the county of Cumberland, defendant.

In a plea of debt.

For that the said defendant, The Maine Central Railroad Company, now is, and was on the first day of April, A. D. 1875, a railroad corporation existing under the laws of the State of Maine, and doing business therein, and whose lines of railroad are, and then were, entirely within said State.

And the governor and council of said State, at a session held at Augusta, in the county of Kennebec, on the 23d day of April, A. D. 1875, did, according to the statute in such case made and provided, as-
2 certain the true market-value of the shares of said corporation on the first day of April, A. D. 1875, to be forty-eight dollars per share.

And did then and there estimate therefrom the fair cash value of all of said shares, constituting the capital stock of said corporation on said first day of April aforesaid, to be seventeen hundred and twenty thousand one hundred and twenty-eight dollars ($1,720,128).

And from this last sum did then and there deduct the value of the real estate and other property of said corporation actually subject to local taxation, to wit, three hundred and eighty thousand five hundred and eighty dollars ($380,580), leaving the sum of thirteen hundred and thirty-nine thousand five hundred and forty-eight dollars ($1,339,548).

And did then and there assess upon said corporation a tax of one and one-half per cent. of said last-named sum as a tax upon its corporate franchise, to be paid by said corporation into the treasury of said State, to wit, the sum of twenty thousand and ninety-three dollars and twenty-two cents ($20,093.22).

And thereupon, according to the statute in such case made and provided, the secretary of state of said State of Maine, at said Augusta, on said 23d day of April aforesaid, did certify to the State treasurer of said State all the aforesaid doings of the governor and council
3 aforesaid, and the said treasurer thereupon, to wit, on said 23d day of April aforesaid, at said Augusta, did notify the said defendant corporation thereof.

And by force of said proceedings of the said governor and council, and secretary of state and State treasurer, and by force of the statute in such case made and provided, the said defendant corporation then and there became indebted and liable to pay said sum of twenty thousand ninety-three dollars and twenty-two cents ($20,093.22) to said State, into the treasury thereof, one-half of said sum, to wit, ten thou-

sand forty-six dollars and sixty-one cents ($10,046.61) on or before the first day of July, A. D. 1875, and the balance thereof, to wit, ten thousand forty-six dollars and sixty-one cents ($10,046.61) on or before the first day of January, A. D. 1876.

Yet the said defendant has not paid said sum, nor any part thereof, though said first days of July and January aforesaid have long since passed; whereby and by force of the statute in such case made and provided an action hath accrued to said State of Maine to recover from said defendant corporation said sum of twenty thousand ninety-three dollars and twenty-two cents ($20,093.22), with legal interest on the same, to wit, the first installment of ten thousand forty-six dollars and sixty-one cents, with interest from the said first day of July aforesaid,

4 and the second installment of ten thousand forty-six dollars and sixty-one cents ($10,046.61) with interest from the said first day of January aforesaid, to the damage of the said plaintiffs (as they say) the sum of forty thousand dollars.

The writ in this action is dated March 1st, A. D. 1876.

This action was entered at the April term of this court, A. D. 1876, when and where the defendants filed a plea of general issue and brief statement, as follows:

And the said defendants come, &c., and say that they were never indebted in manner and form as in the declaration alleged, and of this they put themselves on the country.

By DRUMMOND & WINSHIP,
their Attorneys.

And for a brief statement of their defence filed according to the statute in such case made and provided, they say that the statute aforesaid, by authority of which the tax on the declaration mentioned was assessed upon them, is in conflict with the provisions of their charter, and if enforced against them is a violation of the constitution of the State of Maine, and the Constitution of the United States, in this, that the statute aforesaid is a law impairing the obligation of the contract in their charter.

And the pl'ff likewise.

By L. A. EMERY, *Attorney-General.*

5 Whereupon the case was made law on agreed statement as follows, and continued to await the decision of the law court.

Agreed statement.

Supreme judicial court, Cumberland County, April term, 1876.

THE STATE OF MAINE
vs.
THE MAINE CENTRAL RAILROAD CO.

This is an action of debt; the plea is the general issue, with a brief statement under the statute.

The plaintiff joins the issue tendered.

This case is submitted to the court upon the following agreed statement of facts for judgment thereon according to law.

The declaration, plea, and brief statement are made part of the case.

It is admitted that the Maine Central Railroad Company, on the first day of April, A. D. 1875, was, and ever since has been, the owner of lines of railroad in this State as alleged in the declaration.

It is admitted that the tax described in the declaration was formally assessed upon said company according to the provisions of the statute by which it was authorized, and was certified to the State treasurer, who notified the defendant corporation thereof as alleged in the declaration.

6 The tax sued for was assessed under the provisions of chapter 258 of the public laws of 1874, and this action was brought under said act and chapter 115 of the public laws of 1876.

The Maine Central Railroad Company as existing on the first day of April, A. D. 1875, and ever since, was formed by the consolidation of other corporations in the manner hereinafter stated.

The Androscoggin & Kennebec Railroad Company was incorporated March 28, A. D. 1845, was afterwards organized, and constructed its railroad from Waterville to Danville.

The Penobscot & Kennebec Railroad Company was incorporated April 7, A. D. 1845, was afterwards organized, and constructed its railroad from Bangor to Waterville, connecting there with the Androscoggin and Kennebec Railroad.

The charters of these two companies each contained the two following sections:

"SEC. 15. All real estate purchased by said corporation for the use of the same under the fifth section of this act shall be taxable to said corporation by the several towns, cities, and plantations in which said lands lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality, in such town, city, or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate, and be taxable as such to the owners thereof, in the places where they reside and have their homes.

7 "And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the legislature; from and after which time one moiety, or such other portion as the legislature may from time to time determine, of the net income of said railroad accruing thereafter, over and above ten per centum per annum first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation as a tax into the treasury of the State for the use of the State.

"And the State may have and maintain an action against said corporation therefor to recover the same. But no other tax than herein is provided shall ever be levied or assessed on said corporation, or any of their privileges or franchises.

"SEC. 17. The legislature shall at all times have the right to inquire into the doings of the corporation, and into the manner in which the privileges and franchises herein and hereby granted may have been used and employed by said corporation, and to correct and prevent all abuses of the same, and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities, and duties hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities, or obligations; and this charter shall not be revoked,

8 annulled, altered, limited, or restrained, without the consent of the corporation, except by due process of law."

On the first of April, A. D. 1856, the legislature enacted a law entitled "An act to authorize the consolidation of certain railroad corporations," naming (among others) the aforesaid corporations.

The fourth section of said act is as follows:

"SEC. 4. Upon the making of said agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or a counterpart thereof in the office of the secretary of the State, and immediately upon and after the first election of directors of said new corporation, the said corporations so making said agreement shall be consolidated, and together constitute the new corporation provided for in said agreement, to be known by the corporate name therein mentioned; and the details of said agreement shall be carried into effect as provided therein; and such new corporation shall have all the powers, privileges, and immunities possessed by each of the corporations so entering into said agreement, and be subject to all the legal obligations now resting on them respectively: Provided, however, That nothing in this act shall be construed as extinguishing said consolidated corporations, or annulling their charters; but they shall severally be regarded as still subsisting, so far as their continuance for the purpose of

9 upholding any right, title, or interest, power, privilege, or immunity, ever possessed, exercised, or enjoyed by either of them, may be necessary for the protection of the creditors or mortgagees of either of them, or of such new corporation; the separate exercise of their respective powers, and the separate enjoyment of their respective privileges and immunities, being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease, so far and for such time as the protection of such creditors or mortgagees may require."

By virtue of said act, said Androscoggin and Kennebec Railroad Company and said Penobscot and Kennebec Railroad Company, on the ninth of September, A. D. 1862, adopted a contract of consolidation, which was duly filed in the office of the secretary of state, and a corporation was organized thereunder on the twenty-eighth day of October, A. D. 1862, by the name of the Maine Central Railroad Company. This contract is made a part of the case, Exhibit A.

The Maine Central Railroad Company has ever since owned and operated the railroads of the two corporations of which it was composed.

The Kennebec and Portland Railroad Company was incorpo-

10 rated April 1, A. D. 1836; it was afterwards organized, and constructed a railroad from Augusta to Portland; by legislative authority, it issued its bonds, secured by a mortgage of its railroad and franchise; in 1859, proceedings were commenced under chapter 51 of the revised statutes of 1857, and on the eighteenth of May, A. D. 1862, the foreclosure was perfected, and on the twentieth of May, 1862, a new corporation was formed by the holders of the bonds secured by said mortgage under said law of 1857, by the name of the Portland and Kennebec Railroad Company, which owned and operated the railroad constructed by the Kennebec and Portland Railroad Company until it consolidated with the Maine Central Railroad Company, as hereinafter stated.

The Somerset & Kennebec Railroad Company was chartered August 10, A. D. 1848; it was organized, and constructed a railroad from Skowhegan to Augusta, and continued to own it and operate it (as lessor)

until said corporation was consolidated with the Maine Central Railroad Company, as hereinafter stated.

The Androscoggin Railroad Company was incorporated the tenth day of August, A. D. 1848, and was duly organized; it constructed a railroad from Farmington to Leeds Junction by legislative authority;
11 it issued its bonds secured by a mortgage of its railroad and franchise; this mortgage was foreclosed under chapter 51 of the revised statutes of 1857 on the eleventh day of May, A. D. 1865, and by virtue of said law the holders of the bonds secured by said mortgage formed a corporation by the name of the Leeds & Farmington Railroad Company, which continued to own and operate (directly or as lessor) said railroad, until said company consolidated with the Maine Central Railroad Company, as hereinafter stated.

On the twenty-sixth of February, A. D. 1873, "An act for the consolidation of certain railroads" was enacted by the legislature, by virtue of which the said Portland & Kennebec Railroad Company, Somerset & Kennebec Railroad Company, and Leeds & Farmington Railroad Company were consolidated with said Maine Central Railroad Company by a contract becoming operative on the sixteenth day of November, A. D. 1874, by filing in the office of the secretary of state, a copy of which contract is made a part of this case, Exhibit B.

Since said sixteenth day of November, A. D. 1874, said Maine Central Railroad Company has owned and operated the railroads of
12 said corporations consolidated with it as well as the railroad before that time owned by itself.

Upon this consolidation the Maine Central Railroad Company issued no new stock, but its capital stock and the certificates thereof have remained the same as before said consolidation.

None of the stock of the Portland and Kennebec Railroad Company had been exchanged for bonds of the Maine Central Railroad Company, as provided in the second and third articles of said contract of consolidation, on said first day of April, A. D. 1875.

The charters of all the corporations herein mentioned, and all acts of the legislature in reference to them, or any of them, are made a part of this case.

L. H. EMERY, *Attorney-General,*
For State.
DRUMMOND & WINSHIP,
For Defendants.

13 EXHIBIT A.

Contract of consolidation.

Whereas, by a statute of the State of Maine, entitled "An act to authorize the consolidation of certain railroad corporations," approved April 1, 1856, and amended March 17, 1862, by the repeal of the ninth section thereof, it is provided as follows:

SEC. 1. The Androscoggin and Kennebec, the Androscoggin, and the Penobscot and Kennebec Railroad Companies, or any two of them, are hereby authorized at any time to consolidate such companies into one corporation in the manner following:

SEC. 2. The directors of any two or more of said corporations may enter into an agreement, under their respective corporate seals, for the consolidation of said corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new

corporation, the number of directors thereof—which shall not be less than five nor more than eleven—the time and place of holding the first election of directors, the amount of capital and the number of shares of the stock of the new corporation, the manner of converting the shares of capital-stock in each of said corporations into the shares of such new corporation.

14 SEC. 3. Such agreement of the directors shall not be deemed to be the agreement of said corporation so proposing to consolidate until after it has been submitted to the stockholders of each of said corporations separately, at a legal meeting thereof to be called by each corporation in accordance with its charter and by-laws, and has been sanctioned and approved by such stockholders by a vote of at least a majority of the stock present at such meetings respectively, voting by ballot at such meetings in regard to said agreement, either in person or by proxy, each share of such capital stock being entitled to one vote; and when such agreement of the directors has been sanctioned and approved by each of the meetings of the respective stockholders separately, after being submitted to such meetings in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said several corporations, and a sworn copy of the proceedings of such meetings made by the clerks thereof respectively and attached to said agreement, shall be evidence of the holding and of the action of such meeting in the premises.

SEC. 4. Upon the making of said agreement mentioned in the preceding section in the manner required therein, and filing a duplicate or a counterpart thereof in the office of the secretary of state, and immediately upon and after the first election of directors of said new

15 corporation, the said corporations so making said agreement shall be consolidated, and together constitute the new corporation provided for in said agreement, to be known by the corporate name therein mentioned, and the details of said agreement shall be carried into effect as provided therein, and such corporation shall have all the powers, privileges, and immunities possessed by each of the corporations so entering into said agreement, and be subject to all the legal obligations now resting on them respectively: Provided, however, that nothing in this act shall be construed as extinguishing said consolidated corporations or annulling their charters, but they shall severally be regarded as still subsisting so far as their continuance for the purpose of upholding any right, title, or interest, power, privilege, or immunity ever possessed, exercised, or enjoyed by either of them may be necessary for the protection of the creditors or mortgagees of either of them, or of such new corporation; the separate exercise of their respective powers and the separate enjoyment of their respective privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease so far and for such time as the protection of such creditors or mortgagees may require.

SEC. 5. Upon the election of the first board of directors of the

16 said new corporation, created by the agreement of the several companies, all and singular the rights, franchise, and interest of the said several corporations so consolidated, in and to every species of property, real, personal, and mixed, and things in action thereunto belonging, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the rights of way and all other rights of property, franchise, and interest, in the same man-

ner and to the same extent as if the said several corporations so consolidated should have continued to retain the title and transact the business of said corporation; and the title and real estate acquired by either of said corporations shall not be deemed to revert or be impaired by means of such act of consolidation, or anything relating thereto; and all suits that either of said corporations so consolidated could have maintained, shall survive to and may be brought in the name of said new corporation.

SEC. 6. The rights of creditors of any corporation that shall be consolidated shall not in any manner be impaired by any act of consolidation, nor shall any liability or obligation for the payment of any money now due, or hereafter to become due, to any individual, person, or corporation, or any claim for damages for any act done, or neglect suffered by such corporation, be released or impaired; but such new cor-
17 poration is declared to succeed to such obligations and liabilities, and to be held liable to pay and discharge all the debts and liabilities of each of the corporations that shall be so consolidated, whether on contract or for misconduct or neglect, either to the State or to individuals, or to any municipal or other corporation: and it shall be liable to have an action brought against it to enforce the payment of any money or damages or the performance of any duty which any corporation consolidated into such new corporation was liable to pay or perform in the same manner as if such new corporation had itself incurred the obligation or liability to pay such money or damages, or perform such duty; and no suit, action, or other proceeding now pending before any court or tribunal in which any railroad company which may be so consolidated is a party, shall be deemed to have abated or discontinued, by means of any such agreement of consolidation; but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into such agreement of consolidation, or the said new corporation may be substituted as a party in the place of any corporation of which it shall be composed by order of the court in which such action, suit, or proceeding may be pending, and with the consent of the other party.

SEC. 7. In the event of a failure of said new corporation to per-
18 form any of the terms or conditions of any mortgage given by either of said consolidated corporations, or the terms or conditions of any act of the legislature authorizing such mortgage, any notice to the officers or stockholders of either of such consolidated corporations, required by the terms of such mortgage or act, shall be given in the same manner and with the same effect to the like officers or stockholders of such new corporation; and in case the mortgagees therein named shall elect to take possession of the property mortgaged, or to foreclose such mortgage, as provided therein or in any act authorizing the same, the corporation which executed said mortgage shall again exercise and possess separately all its original powers, privileges, and immunities, so far as the protection of the interests of such mortgagees may require; and the said mortgagees shall have all the rights and powers which they would have possessed had this act not been passed, and shall be entitled to take immediate possession of all the real estate and fixtures on that part of the line covered by their mortgages respectively, owned or used for the purpose of working such road by such new corporation, and to use the same so long as they shall rightfully retain possession of the road: Provided, however, that on the full performance of the condition of such mortgage, for the breach of which such entry shall have been made prior to the foreclosure thereof, such new

19 corporation may resume possession of such mortgaged premises, and the exercises and enjoyments of all the powers and rights which it possessed before such breach of condition.

SEC. 8. In case the Penobscot and Kennebec Railroad Company shall become one of the consolidated corporations, and until all the conditions of its several mortgages to the city of Bangor shall be duly performed, the city of Bangor shall have the same power to appoint one of the directors of such new corporation, and in the same manner that it now has to appoint one of the directors of the Penobscot and Kennebec Railroad Company by the terms of the tenth section of the act of March 1st, A. D. 1854, authorizing it to loan its credit to said company, and shall have a lien, which shall take precedence of all other liens hereafter arising, to the amount of seventy five thousand dollars, in the cars, engines, and other equipments of such new corporation, and the right, in breach of the conditions of any of said mortgages, to take so many, and such of said cars, engines, and other articles of equipment as will, at the appraisal of three disinterested and competent men, be of that value, and to use the same until said conditions shall be complied with.

SEC. 10. Any corporation named in this act, and any corporation formed under it, and the Kennebec and Portland, and the Somer-
20 set and Kennebec Railroad Corporations, or either of said corporations, are hereby authorized to let or lease their roads, franchise, or property for hire, or to contract for the running and managing the same with any individual or other railroad corporation for a term of years, and such lease or contract so made with such individual or corporation shall be deemed valid and binding upon the parties entering into the same; provided, however, that by reason of such lease or contract, the corporations owning the road so leased, shall not be released from any of their corporate liabilities.

SEC. 11. This act shall take effect and be in force from and after its approval by the governor.

Now, therefore, be it known, that the directors of the said Androscoggin and Kennebec Railroad Company, of the first part, and the directors of the said Penobscot and Kennebec Railroad Company, of the second part, by virtue of the authority so granted to them, do enter into the agreement hereinafter written, for the consolidation of said two corporations.

It is agreed as follows:

First. That said Androscoggin and Kennebec Railroad Company and said Penobscot and Kennebec Railroad Company shall be consolidated into one corporation.

Second. That the name of the new corporation thus created shall be the Maine Central Railroad Company.

21 Third. That the capital stock of said Maine Central Railroad Company shall consist of fifty thousand shares, of the par value of one hundred dollars each; and each share of the capital stock of either of said consolidated corporations shall be taken and deemed to be a share in the capital stock of the Maine Central Railroad Company, for all purposes, until the issue of certificates of shares in the new corporation, as hereinafter provided, and no longer; and shall entitle the holder thereof, or his representative, to one vote at the meeting for the first election of directors.

Fourth. That the immediate government and direction of the affairs of said Maine Central Railroad Company shall be vested in seven directors, who shall be chosen in the manner hereinafter provided, and shall hold their offices until others shall have been duly elected and

qualified to take their places, a majority of whom shall form a quorum for the transaction of business; and they shall elect one of their number to be president of the board, who shall also be president of the corporation, and shall have authority to choose a clerk who shall be sworn to the faithful discharge of his duty; and a treasurer, who shall be sworn and also give bonds to the corporation, with sureties to the satisfaction of the directors, in a sum not less than twenty thousand dollars, for the faithful discharge of his trust.

22 Fifth. That a meeting of the stockholders of the Androscoggin and Kennebec Railroad Company and the stockholders of the Penobscot and Kennebec Railroad Company shall be held at Waterville, in said State of Maine, at the repair shop of the Androscoggin and Kennebec Railroad Company, on Thursday, the twenty-fifth day of September next, at eleven o'clock a. m., for the election of directors of the Maine Central Railroad Company, and for the transaction of any other business which may be deemed by said meeting necessary or proper to be done to perfect said consolidation, to complete the organization of said new corporation, and to provide for the due and orderly conducting of its affairs and the management of its property.

Sixth. That notice of the time, place, and purpose of such meeting, signed by the president of the Androscoggin and Kennebec Railroad Company and by the president of the Penobscot and Kennebec Railroad Company, shall be published, at the least, fourteen days before said twenty-fifth day of September in one or more newspapers published in Portland and Bangor.

Seventh. That the president of the Androscoggin and Kennebec Railroad Company, if he be present, and, if he be absent, then the president of the Penobscot and Kennebec Railroad Company shall preside at said meeting till its organization shall be completed by the election of a chairman and secretary; and if neither of said presidents shall be

23 present, then any other director of either of said corporations may so preside.

Eighth. That after such consolidation is accomplished, the president and directors of the Maine Central Railroad Company, for the time being, shall have as full and ample power and authority in relation to the business, property, and affairs of that corporation, including the power to purchase, and hold, and sell, and convey, in the name and for the use of the corporation, as the president and directors of the Androscoggin and Kennebec Railroad Company or the president and directors of the Penobscot and Kennebec Railroad Company now have respectively, in relation to the business, property, and affairs of their companies respectively, provided, however, that no assessment shall be laid upon the shares of such new corporation.

Ninth. That, as soon after the first election of directors as may be, certificates of shares in the capital stock of the Maine Central Railroad Company shall be prepared in proper form, and shall be issued in exchange for certificates of stock, share for share, of the Androscoggin and Kennebec Railroad Company or of the Penobscot and Kennebec Railroad Company, on the request of the respective owners thereof.

Tenth. That the annual meeting of the members of said corporation shall be holden on the last Wednesday of June of each year or such other days as shall be determined by the by-laws, at such time

24 and place as the directors, for the time being, shall appoint, at which meeting the directors shall be chosen by ballot, each proprietor, by himself or proxy, being entitled to as many votes as he holds shares, and the directors are hereby authorized to call special meetings

of the stockholders whenever they shall deem it expedient and proper, giving notice as the corporation, by their by-laws, shall direct.

Eleventh. That, at the meeting provided for in the fifth section of this agreement, and prior to the election of directors, the Androscoggin and Kennebec Railroad Company shall deliver to the chairman of said meeting valid certificates of shares in the capital stock of said Androscoggin and Kennebec Railroad Company sufficient in amount to liquidate all the bonds of said Androscoggin and Kennebec Railroad Company for the delivery of such stock, issued under and by virtue of a vote of the stockholders of said Androscoggin and Kennebec Railroad Company, passed on the 27th day of April, A. D. one thousand eight hundred and fifty-three, or a vote passed on the sixteenth day of October, A. D. one thousand eight hundred and fifty-six, to wit, seven thousand and one hundred shares, which certificates shall be held by said chairman, in trust, until the organization of the first board of directors of the Maine Central Railroad Company, and then be delivered by him to said new corporation, to be held by it until such time as said bonds shall respectively mature, and then to be delivered in liquidation of said bonds to the holders thereof, respectively, on demand, which holders, having so received said stock in liquidation of said bonds, shall have the right, respectively, to demand and receive in exchange therefor the stock, share for share, of the Maine Central Railroad Company.

Twelfth. That the holders of the bonds of the Penobscot and Kennebec Railroad Company, issued under and by virtue of a vote of the stockholders thereof, passed on the eight' day of July, A. D. one thousand eight hundred and fifty-six, commonly called the third-mortgage bonds, shall be entitled, on the surrender of their said bonds, respectively, to receive in exchange therefor the bonds of the Maine Central Railroad Company, to the amount of forty per cent. of the principal of each bond so surrendered, and of the interest which had accrued thereon, on the first day of April, A. D. one thousand eight hundred and sixty-two, and shares of the capital stock of said Maine Central Railroad Company to an amount equal, at par value, to sixty per cent. of said bonds and interest.

Thirteenth. That the holders of the bonds of the Penobscot and Kennebec Railroad Company, issued under and by virtue of a vote of the stockholders thereof, passed on the tenth day of July, A. D. one thousand eight hundred and fifty-five, commonly called the second-mortgage bonds, shall be entitled, respectively, on the surrender of such of the coupons attached to their said bonds as are now overdue, and the release of all interest that had accrued on their said overdue coupons, respectively, to the first day of April, A. D. one thousand eight hundred and sixty-two, to receive therefor, in payment of such coupons and interest, the bonds of the Maine Central Railroad Company for an amount equal to the sums thus paid.

Fourteenth. That the president and directors of the Maine Central Railroad Company shall be, and hereby are, authorized and empowered to issue, from time to time, as they shall be needed, certificates of so many shares in the capital stock of said company as may be required to carry out the provisions of this agreement in relation thereto, and to issue the bonds of said company to an amount not exceeding four hundred thousand dollars, payable in eight years, bearing interest at the rate of six per cent. per annum, with coupons for interest attached, and to deliver so many of said bonds to said bondholders of the Penobscot and Kennebec Railroad Company as may be necessary to carry into

effect the provisions of this agreement relating to said bondholders, and to sell or pledge so many of said bonds as may not be required to pay said bondholders, from time to time, to raise money for the use of said Maine Central Railroad Company, and to execute a mortgage of all the property of said Maine Central Railroad Company to secure the payment of such bonds and coupons.

27 In witness whereof the parties of the first part have affixed hereto in duplicate the corporate seal and the signatures of the president and a majority of the directors of the Androscoggin and Kennebec Railroad Company, and the parties of the second part have affixed hereto in duplicate the corporate seal and the signatures of the president and a majority of the directors of the Penobscot and Kennebec Railroad Company, on this twentieth day of August, anno Domini one thousand eight hundred and sixty-two.

28 EXHIBIT B.

Agreement of consolidation.—Dated August 25, 1873.

Whereas, by an act of the legislature of the State of Maine, approved the twenty-sixth day of February, A. D. 1873, entitled "An act for the consolidation of certain railroads," the Portland and Kennebec, the Somerset and Kennebec, the Androscoggin, and the Leeds and Farmington Railroad Companies are authorized to consolidate said companies, or such of them as elect so to do, with the Maine Central Railroad into one corporation, upon the principles, in the manner, and upon the terms and conditions, as far as the same may be applicable, of the act of April 1, 1856, entitled "An act to authorize the consolidation of certain railroad corporations":

Now, therefore, be it known that the directors of said Portland and Kennebec Railroad Company, of said Somerset and Kennebec Railroad Company, and of said Leeds and Farmington Railroad Company, in behalf of said companies respectively, by virtue of the authority so granted them, do hereby enter into an agreement with the directors of said Maine Central Railroad Company for the consolidation of their respective companies with said Maine Central Railroad Company, as follows:

29 ART. 1. Said Portland and Kennebec Railroad Company, said Somerset and Kennebec Railroad Company, and said Leeds and Farmington Railroad Company respectively agree to be consolidated with and merged in said Maine Central Railroad Company and become a part thereof; and said Maine Central Railroad Company agrees thereto.

ART. 2. The Maine Central Railroad Company having already purchased, and being now the owner of a lease of the Portland and Kennebec Railroad, its franchise and appurtenances, for nine hundred and ninety-nine years, dated May 12, 1870, to which reference is hereby made, and having issued its stock as stipulated in said lease to said Portland and Kennebec Railroad Company, it is agreed, in order to carry out the stipulations of the sixth article of said lease, that the stock of the Portland and Kennebec Railroad Company may be exchanged for the consolidated bonds of the Maine Central Railroad Company, at the rate of one hundred dollars in stock for eighty-eight dollars in said bonds, with an equitable adjustment of interest.

Upon said exchange of stock for bonds, said stock in said Portland and Kennebec Railroad Company shall be considered cancelled; and the stock of the Maine Central Railroad Company heretofore issued to said Portland and Kennebec Railroad Company under the stipulations

of said lease shall stand for and represent in said Maine Central
30 Railroad Company the stock of said Portland and Kennebec Railroad Company merged and deemed cancelled as aforesaid.

ART. 3. The Maine Central Railroad Company having already purchased and being now the owner by assignment from the Portland and Kennebec Railroad Company of a lease of the Somerset and Kennebec Railroad, its franchise and appurtenances, executed January 1, 1864, and on the first day of January, 1870, extended for the term of nine hundred and ninety-nine years, to which lease and assignment reference is hereby made, it is agreed that the stock of the Portland and Kennebec Railroad Company, issued to said Somerset and Kennebec Railroad Company as part consideration for said lease and the purchase of the stock of said Somerset and Kennebec Railroad Company, may be exchanged for the consolidated bonds of the Maine Central Railroad Company, at the rate of one hundred dollars in stock for eighty-eight dollars in bonds, with an equitable adjustment of interest, and the stock of the Maine Central Railroad Company apportioned by the Portland and Kennebec Railroad Company (parcel of the Maine Central Railroad Company stock named in the preceding article) to said Somerset and Kennebec Railroad Company, as the balance of the consideration for said lease of said last-mentioned railroad company and the purchase of the stock thereof, shall stand for and represent in
31 the stock of the Maine Central Railroad Company the stock of the Somerset and Kennebec Railroad Company, which thereupon shall be deemed to be cancelled.

ART. 4. The Maine Central Railroad Company having already purchased and being now owners of a lease of the Leeds and Farmington Railroad Company for nine hundred and ninety-nine years, and of the stock of said company, which is now held in trust for said Maine Central Railroad Company, it is agreed that said Leeds and Farmington Railroad Company shall be merged in said Maine Central Railroad Company, and that its stock now held in trust for said Maine Central Railroad Company shall be cancelled.

ART. 5. This contract shall take effect when the same shall have been submitted to and ratified by the corporations aforesaid, parties hereto, at meetings called, held, and conducted in the manner provided in section three of the act of April 1, 1856, aforesaid, and thereupon the provisions of sections five, six, seven, and eight of said act shall apply to the Maine Central Railroad Company in the same manner and to the same extent that they apply to a new consolidated corporation formed under the provisions of said act.

If either of the corporations proposing to be consolidated with and merged in the Maine Central Railroad Company shall elect not to execute and adopt this contract, it shall nevertheless take effect as to such of said companies as shall execute and adopt it.

32 In witness whereof the corporate seals of the respective companies, parties hereto, have been hereunto affixed, and members of the board of directors of each said companies, constituting in each case a quorum of their respective boards, for and in behalf of their said respective companies, have hereunto set their hands this twenty-fifth day of August, in the year of our Lord eighteen hundred and seventy-three.

The decision of the law court received at the January term, A. D. 1877, was as follows:

Judgment for the State.

At said January term, to wit, March 22, A. D. 1877, by agreement of parties, said action was continued to the present term for assessment of damages.

It is therefore considered by the court that the said State of Maine recover against the Maine Central Railroad Company the sum of ten thousand and forty-six dollars and sixty-one cents, and interest from July 1, 1875, and ten thousand and forty-six dollars and sixty-one cents, and interest from Jan'y 1, 1876, making the sum of twenty-two thousand one hundred and fifty-two dollars and seventy-seven cents, debt
33 or damage, and costs of suit taxed at dollars and cents.

No ex'on issued.

Recorded by—

F. J. LITTLEFIELD, *Clerk.*

STATE OF MAINE:

I, F. J. Littlefield, clerk of the supreme judicial court of said State, at Portland, in the county of Cumberland, do hereby certify that the foregoing is a full, true, and perfect transcript of the record of the cause therein named, as the same appears of record in my office.

Given under my hand and the seal of said court, at office in Portland, this seventeenth day of October, A. D. 1877.

[SEAL.] F. J. LITTLEFIELD, *Clerk.*

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme judicial court of the State of Maine, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between the State of Maine, plaintiff, and the Maine Central Railroad Company, a corporation created by law of said State, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said railroad corporation: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the

said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this thirtieth day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.]

A. H. DAVIS,
Clerk of the Circuit Court of the United States.

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

35 The United States of America to the State of Maine, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein the Maine Central Railroad Co. is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this thirtieth day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

NATHAN CLIFFORD,
Associate Jus. Sup. Court of the U. S.

36 STATE OF MAINE:

ATTORNEY-GENERAL'S OFFICE,
September 1, *A. D.* 1877.

Due and legal service of the within citation is hereby expressly acknowledged.

L. A. EMERY,
Attorney-General.

MAINE DIST., *ss:*

OFFICE C. C. C. U. S.

Filed Oct. 2, '77.
At't:

A. H. DAVIS, *Clerk.*

37 Know all men by these presents, that the Maine Central Railroad Company, a corporation established by the laws of the State of Maine, as principal, and Abner Coburn, of Skowhegan, in the county of Somerset, and Darius Alden, of Augusta, in the county of Kennebec, as sureties, are holden and stand firmly bound and obliged unto the State of Maine in the sum of thirty thousand dollars to be paid to the treasurer of said State of Maine, to which payment well and truly to be made, said railroad company binds itself, and said Coburn and Alden bind themselves, their heirs, executors, and administrators, firmly by these presents.

In witness whereof said Maine Central Railroad Company has caused these presents to be executed in its behalf and its corporate seal hereunto affixed; and the said Coburn and Alden have hereunto set their hands and seals this thirtieth day of August, A. D. 1877.

The condition of this obligation is such, that whereas said State of Maine by the consideration of the justices of the supreme judicial court held at Portland in and for the county of Cumberland on the second Tuesday of April, A. D. 1877, recovered judgment against said
38 Maine Central Railroad Company for the sum of twenty-two thousand one hundred fifty-two dollars and seventy-seven cents debt or damage and costs of suit taxed at dollars and cents;

And whereas said Maine Central Railroad Company has this day sued out a writ of error to the Supreme Court of the United States to reverse said judgment:

Now, if said Maine Central Railroad Company shall prosecute said writ to effect, and, if it shall fail to make its plea good, shall answer all damages, then this obligation shall be void, otherwise shall remain in full force.

[SEAL.] MAINE CENTRAL RAILROAD CO.,
By J. S. CUSHING, *Treas'r.*
ABNER COBURN.
D. A. ALDEN.

OCT. 2, 1877.

Approved.

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

(Indorsed:) Bond. Maine Central Railroad *v.* the State of Maine, in error. Maine Dist. ss. Office C. C. C. U. S. Filed Oct. 2, 1887. Att't: A. H. Davis, clerk.

(Indorsement on cover:) No. 953. The Maine Central Railroad Company, plaintiff in error, vs. The State of Maine. Maine supreme judicial court. Filed 26th October, 1877.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE MAINE CENTRAL RAILROAD COMPANY, IN ERROR,

vs.

THE STATE OF MAINE.

No. .

OCTOBER TERM, 1877.

ARGUMENT FOR THE PLAINTIFFS IN ERROR.

BY JOSIAH H. DRUMMOND.

Stephen Berry, Printer, 37 Plum Street, Portland, Me.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE MAINE CENTRAL RAILROAD COMPANY, IN ERROR,
vs.
THE STATE OF MAINE.

No. 953.
OCTOBER TERM,
1877.

ARGUMENT FOR THE PLAINTIFFS IN ERROR.

BY JOSIAH H. DRUMMOND.

On March 4, 1874, the Legislature of Maine passed an "Act relating to taxation of railroad companies," (Ch. 258) of which the following is an extract:

"SECT. 2. The Governor and Council shall ascertain the true market value of the shares of each railroad corporation in this State, and shall estimate therefrom the fair cash valuation of all of said shares, constituting the capital stock of such corporation on the first day of April next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this act. From this valuation shall be deducted the value of the real estate and other property of the corporation which is actually subjected to local taxation, as ascertained from the returns or otherwise; and in case of railroad companies the lines of which extend beyond the limits of this State, there shall also be deducted such portion of the whole valuation of their capital stock, ascer-

tained as aforesaid, as is proportional to the length of that part of their lines lying without the State.

"SECT. 3. Every railroad corporation embraced in section one of this act, shall annually pay a tax of one and one-half per cent. upon its corporate franchise, as determined in the preceding section. Such tax shall be assessed by the Governor and Council on or before the first day of May of each year; and upon such assessment being made, the Secretary of State shall certify the same to the State Treasurer, who shall thereupon notify the several companies thereof, and the tax so assessed shall be in lieu of all taxes on shares in the said railroad corporation as heretofore required by law, and no tax shall be assessed by municipal authorities on any shares therein for municipal or other purposes. Said tax to be paid, one-half on or before the first day of July then next, and one-half on or before the first day of January then next."

The case finds that the Maine Central Railroad Company on the first day of April, A. D. 1875, was, and ever since has been, the owner of "a railroad in this State": that the tax to be assessed for 1875 was formally assessed in accordance with the provisions of the statutes: and that the required notice was given.

The tax not being paid, an action of debt was commenced in the Supreme Court of Maine, in which the Company pleaded that the Act of 1874, by authority of which the tax was assessed, was in conflict with the provisions of their charter, and impaired the obligation of the contract in their charter.

Upon an agreed statement of the facts, the Supreme Court of Maine gave judgment for the State: and the

Company has brought the case here by a writ of error.

The sole question at issue in the Court below was, whether the tax, as a whole, could be legally assessed against the Company. For it was admitted that if any portion of the Company's railroad could not be legally taxed, the action could not be maintained.

In other words, the Company claimed that under their charter a large part of their railroad was exempt from any taxation other than that provided in their charter.

The Supreme Court of Maine decided that the Company has, in their charter, no exemption from any tax imposed upon them under a general law of the State.

I apprehend that the sole question here is, whether the Company has any valid, subsisting contract in their charter in relation to the manner in which they may be taxed.

The case finds that the Maine Central Railroad Company was originally formed by the consolidation of the Androscoggin & Kennebec and the Penobscot & Kennebec Railroad Companies: and that the charter of both of those Companies contained the following section:

"SECT. 15. All real estate purchased by said corporation for the use of the same under the fifth section of this act shall be taxable to said corporation by the several towns, cities and plantations in which said lands lie, in the same manner as lands owned by private persons, and shall in the

valuation list be estimated the same as other real estate of the same quality in such town, city or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate, and be taxable as such to the owners thereof in the places where they reside and have their homes.

"And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the Legislature; from and after which time one moiety, or such other portion as the Legislature may from time to time determine, of the net income of said railroad accruing thereafter, over and above ten per centum per annum first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation as a tax into the treasury of the State for the use of the State.

"And the State may have and maintain an action against said corporation therefor to recover the same. But no other tax than herein is provided shall ever be levied or assessed on said coporation or any of their privileges or franchises."

The Act of 1874 authorizes, in terms, a tax "upon the corporate franchise" of this corporation, and it is admitted that such a tax is a tax other than the one provided in the charter, and thus the question arises whether this statute of 1874 overrides and controls the exemption in the charter; if it does, the judgment of the Supreme Court of Maine must be affirmed; if it does not, that judgment must be reversed.

I. It has been argued that the original exemption was liable to be repealed at the pleasure of the Legislature.

These charters were granted in 1845, and it has been argued that the following act of 1831 controlled them:

"All acts of incorporation which shall be passed after the passage of this act, shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the Legislature, in the same manner as if an express provision to that effect were therein contained; unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary."

But both these charters contain the following section:

"SECT. 17. The Legislature shall at all times have the right to inquire into the doings of the corporation, and into the manner in which the privileges and franchises herein and hereby granted may have been used and employed by said corporation, and to correct and prevent all abuses of the same, and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities and duties hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities or obligations; and this charter shall not be revoked, annulled, altered, limited or restrained, without the consent of the corporation, except by due process of law."

It is claimed on the part of the State, that inasmuch as this Act of 1831 is not referred to in these charters, they are subject to that Act. But no such reference is necessary. The Act says the charters "are liable to be amended, altered or repealed," unless in the charter there is inserted "an express limitation or provision to

the contrary." In these charters is inserted the express provision that they shall *not* be "revoked, annulled, altered, limited or restrained without the consent of the corporation." The "express provision to the contrary" is therefore inserted in these charters in terms as plain as can be written. It follows, therefore, that these charters are not affected by this Act of 1831.

II. The principle that a charter is a contract, under the Federal Constitution, the obligation of which the Legislature of a State cannot impair, has been so often decided by this Court (from the cases of Fletcher v. Peck, and the Dartmouth College case, down to those in the last volume of the Reports), that it would be a waste of time even to enumerate them.

But the Supreme Court of Maine has already decided that one of these very charters (the Penobscot & Kennebec, and the other is a copy of that) "is a private contract between the government, acting in its sovereign capacity, and the corporation, binding on both, and cannot be changed or impaired by the Legislature."

State v. Noyes, 47 Maine, 189.

It follows, then, that the State of Maine has entered into a contract with this corporation, that it will never impose upon it any other tax than the one provided in the charter, a contract which it cannot impair, unless this particular provision of the contract was one which the legislature had no power to make.

III. But it is so well settled that the Legislature

may, by contract, exempt a person or corporation from taxation, and that no subsequent Legislature can repeal the exemption, that I merely give a list of some of the authorities:

Cooley on Taxation, 55.
New Jersey v. Wilson, 7 Cranch, 164 (2 Curtis 498).
Gordon v. Tax Appeal Court, 3 Howard, 133, (15 Curtis, 338).
Piqua Branch of State Bank of Ohio, v. Knoop, 16 Howard, 369 (21 Curtis, 190).
Ohio Life Insurance Co. v. Debolt, 16 Howard, 416 (21 Curtis, 230).
Dodge v. Woolsey, 18 Howard, 331, 339.
Mechanics' &c. Bank v. Thomas, 18 Howard, 384.
Jefferson Branch Bank v. Skelley, 1 Black., 436, 446 to 450.
McGee v. Mathis, 4 Wallace, 143.
Von Hoffman v. Quincy, 4 Wallace, 535, 554.
Home of the Friendless v. Rouse, 8 Wallace, 430, 438.
Washington University v. Rouse, 8 Wallace, 439.
Wilmington Railroad v. Reed, Sheriff, 13 Wallace, 264.
Raleigh & Gaston R. R. Co. v. Reed, 13 Wallace, 269.
Tomlinson v. Jessup, 15 Wallace, 454.
Tomlinson v. Branch, 15 Wallace, 460.
Humphrey v. Pegues, 16 Wallace, 244, 249.
Delaware Railroad Tax case, 18 Wallace, 206.
Pacific Railroad Co. v. Magwire, 20 Wallace, 36.
Eire Railway Co. v. Pennsylvania, 21 Wallace, 492, 498.
Bailey v. Magwire, 22 Wallace, 215.
Central Railroad, &c., v. Georgia, 92 U. S., 665.
Branch v. Charleston, 92 U. S., 677.

This power of the Legislature was not, when these charters were granted, or any of the acts in addition

thereto, or under which we claim any rights, were passed, limited by any provisions of our Constitution. The only provision in our Constitution upon the subject is Art. IX, Sec. 8:

"All taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof."

It will be observed that our charters provide that our *real* estate shall be assessed in exact compliance with this provision: the framers of the charters evidently had this provision in mind when the charters were written. The provision does not limit the Legislature in its power to exempt a franchise, &c., from taxation.

By an unbroken line of decisions, therefore, it is settled that the provision in question in our charter is valid and binding upon the State, and that the Act of 1874, under which this tax was assessed, is not applicable to the defendants nor binding upon them, and, therefore, this action cannot be maintained, unless the company has, in some manner, lost the rights originally granted by the charter. Indeed, the Supreme Court of Maine in this very case admit our position up to this point.

State of Maine v. Maine Central R. R. Co.,
66 Maine, 488.

IV. But it is claimed that if the Androscoggin & Kennebec R. R. Company and the Penobscot & Kennebec R. R. Company had an immunity from taxation, they lost it when they consolidated under the Act of

April 1, 1856, and became the Maine Central Railroad Company.

The act, by virtue of which this consolidation was made, is recited at length in the agreement for consolidation, "A," making part of the case (see case, pp. 5 to 8).

The Act prescribes the manner in which the consolidation shall be made, and in section four provides:

"SEC. 4. Upon the making of said agreement mentioned in the preceding section in the manner required therein, and filing a duplicate or a counterpart thereof in the office of the Secretary of State, and immediately upon and after the first election of directors of said new corporation, the said corporations so making said agreement shall be consolidated, and together constitute the new corporation provided for in said agreement, to be known by the corporate name therein mentioned; and the details of said agreement shall be carried into effect as provided therein; and such corporation shall have all the powers, privileges and immunities possessed by each of the corporations so entering into said agreement, and be subject to all the legal obligations now resting on them, respectively: Provided, however, that nothing in this act shall be construed as extinguishing said consolidated corporations or annulling their charters; but they shall severally be regarded as still subsisting so far as their continuance for the purpose of upholding any right, title, or interest, power, privilege, or immunity ever possessed, exercised, or enjoyed by either of them may be necessary for the protection of the creditors or mortgagees of either of them, or of such new corporation; the separate exercise of their respective powers and the separate enjoyment of their respective privileges and immunities being suspended until

the protection of such creditors or mortgagees shall require their resumption, when such suspension shall cease so far and for such time as the protection of such creditors or mortgagees may require.

"SECT. 5. Upon the election of the first board of directors of the said new corporation, created by the agreement of the several Companies, all and singular the rights, franchise and interest of the said several corporations so consolidated, in and to every species of property, real, personal and mixed, and things in action thereunto belonging, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with the rights of way and all other rights of property, franchise and interest, in the same manner and to the same extent as if the said several corporations so consolidated should have continued to retain the title and transact the business of said corporation: and the title and real estate acquired by either of said corporations shall not be deemed to revert or be impaired by means of such act of consolidation or anything relating thereto; and all suits that either of said corporations so consolidated could have maintained, shall survive to and may be brought in the name of said new corporation."

The consolidated corporation has, therefore, "*all the powers, privileges and* IMMUNITIES possessed by each of the corporations so entering into said agreement," &c.

In Tomlinson v. Branch, 15 Wallace, 460, it was held that "when two railroad companies are consolidated, the presumption is, that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed."

In this case, "the contrary" is *not* expressed; but instead, it is expressly provided that the consolidated road has all the "powers, privileges and immunities" of the corporations consolidating.

The same rule is sustained in ~~Humphrey v. Pegues, 16 Wallace, 244~~; Delaware Railroad Tax Case, 18 Wallace, 206; Branch and al. v. Charlestown, 2 Otto, 677; Central R. R. & B. Co. v. Georgia, 2 Otto, 665.

In Morgan v. Louisiana, 93 U. S., 217, while it was held that an exemption from taxation does not pass under the term *franchise*, the case of Trask v. Magwire, 18 Wall., 391, is cited with approval, in which it *does* pass under the term "immunities": so also is Humphrey v. Pegues (above cited), in which the same thing is held. 16 Wall. 244

As both the consolidating Companies had the exemption in their charters, the consolidated Company continued to have it, unless the case can be taken out of the class of cases just cited, and it be shown that these decisions do not apply to it.

V. But it is further claimed that by the merger in the Maine Central Railroad Company, under the Act of 1873, of certain other Companies, which confessedly did not have this immunity from taxation, the Company lost all its immunity from taxation, if it had any.

The Act of 1873 is as follows:

"SECT. 1. The Portland and Kennebec, the Somerset and Kennebec, the Androscoggin, and the Leeds and Farm-

ington Railroad Companies, whose roads are now leased to and operated by the Maine Central Railroad Company, are hereby authorized to consolidate said companies, or such of them as elect so to do, with the Maine Central Railroad Company, into one corporation, upon the principles, in the manner, and upon the terms and conditions, so far as the same may be applicable, of the act of April one, eighteen hundred and fifty-six, entitled 'an act to authorize the consolidation of certain railroad corporations,' under which the Penobscot and Kennebec, and the Androscoggin and Kennebec have become consolidated.

"SECT. 2. No suit, action, or other proceeding now pending before any court or tribunal, in which any railroad company that may be so consolidated is a party, shall be deemed to have abated or discontinued, by reason of any such agreement of consolidation; but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into such agreement of consolidation; *provided*, that the existing rights of stockholders to any of their lines shall not be impaired, and that this act shall not apply to any pending suit."

The agreement for consolidation, "B," was made under this Act.

By Article I the other Companies "were consolidated with and merged in said Maine Central Railroad Company and became a part thereof."

It is admitted that some of these other Companies did not then have the immunity from taxation.

It is claimed that, by this consolidation, the Company acquired not the rights, &c., of each of the Companies consolidating, but "only the privileges, powers and

immunities which the corporation with the least powers, privileges and immunities possessed, and which were common to them all."

This is inconsistent with the fact that the charter of the Company, by virtue of which it controls any given portion of its railroad, is the charter of the Company which originally constructed that particular portion.

In other words, the present charter of the Maine Central Railroad Company consists of the several charters of the original Companies which are now consolidated and merged into the present Company. Its rights, powers and privileges, as to any particular portion of its railroad, must be determined from these charters and not from the Act of consolidation. Its rights to prescribe rates of toll, to maintain its railroad, to cross highways, to hold the real estate taken for the construction of its railroad, and the manner in which these various rights may be exercised, necessarily depend upon the original charters.

Such has been the uniform decision of this court, as is shown abundantly by the cases already cited.

And in Chesapeake &c. R. R. Co. v. Virginia, 94 U. S., 718, the court say (p. 725), in effect, that it is settled by repeated decisions of this court, that when two Companies consolidate, with all the rights, privileges and immunities of each, and one had an exemption and one had not, the con-solidated Company takes the one with the exemption, and the other without—a

doctrine expressly in conflict with the proposition under consideration.

If the immunity from taxation, therefore, which we claim, originally existed, and was not affected by the consolidation of 1862, it was not affected by the consolidation of 1873–74.

VI. But it is also claimed that, by accepting the Act of 1856, and also by accepting that of 1873, the Company subjected its charters to the Act of 1831, giving the Legislature the power to alter and amend them at pleasure.

The proposition is: "The Act of 1856 is an Act of Incorporation: it contains no express exemption from the Act of 1831; therefore that Act applies to it, and, therefore, the clause in the original charter that it should not be 'revoked, annulled, altered, limited or restrained, without the consent of the corporation, except by due process of law,' was repealed."

The Statute of 1831 was in derogation of the common law, and, therefore, must be strictly construed.

1. The Statute of 1831 is limited, in its effect, to "Acts of Incorporation": and we hold that the Act of 1856 was *not* "an Act of Incorporation," within the meaning of the term in the Statute of 1831.

An Act of Incorporation was then understood to be the granting of a franchise *from the State* to a body created by its authority. The act of creation and grant was called a charter.

But in this case, the first section (Webb's Railroad Laws, p. 300) provides that the corporations are "authorized, at any time, to consolidate such Companies into one corporation."

Sections two and three provide for making the agreement of consolidation, and its ratification by the stockholders.

Section four (p. 301) provides that on the filing of the agreement, &c., "the said corporations so making said agreement *shall be consolidated, and together constitute the new corporation provided for in said agreement.*"

Section five (p. 302) provides, that upon the election of the Board of Directors, "all and singular the rights, *franchise* and interest of the corporations so consolidated, in and to every species of property, real, personal and mixed, and things in action thereunto belonging, *shall be deemed to be transferred to and vested in such new corporation* without any other deed or transfer."

The Act is not an Act of Incorporation, because it does not *create* a body corporate, but merely authorizes two bodies corporate, already existing, to unite in one; and does not *grant* a franchise, but merely provides that, by the consolidation, the franchises of the two corporations shall thereby, *eo instanti*, be transferred, to and vested in, the consolidated corporation.

It is true that the Act uses the term "new corporation," but it uses the term to distinguish the consol-

idated corporation from those composing it. In that sense it is a new corporation, but not in the legal sense.

But no new franchise was granted. In Morgan v. Louisiana, 93 U. S., 217, 223, the court say: "The franchises of a railroad corporation are rights and privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like." All these franchises were possessed by the original corporations, and by their union were vested in the consolidated corporation. They did not become new franchises thereby any more than the cars and engines, the title to which was vested in the consolidated corporation in the same manner, became thereby new cars and new engines. No franchise of the consolidated Company can be named that did not come to it from one of the original corporations; and we seek in vain, throughout the Act of 1856, for a single franchise, as above defined, created or conferred by that Act.

The whole scope of the Act is to provide for the union of the corporations under a new name: and we respectfully submit that it is *not* an Act of Incorporation, within the scope of the Statute of 1831.

There is a law of Maine which provides that railroad corporations may change their name and take a new name, with provisions in respect to suits at law very

similar to those in this Act: but I apprehend it will not be claimed that the corporation with the new name would be, in the eye of the law, a new corporation, or that the Act, authorizing the change of name, is an "Act of Incorporation."

2. But we hold, also, that even if the Act of 1856 can be held to be an Act of Incorporation, within the meaning of the Statute of 1831, the immunity from amendment of these charters, contained in section seventeen thereof, continued in the new corporation; and that the case of Shields v. Ohio, decided at the present term, does not conflict with, but rather sustains, this proposition.

Let it be remembered that the Statute of 1831, relied upon by the State in this case, is not, like that in the Shields case, a *constitutional* provision; but that it was just as competent for the Legislature of 1856 to grant a charter with immunity from legislative control as it was for the Legislature which granted these charters. In the Ohio case, the Legislature could not have done it, if it would: and if the language of the Act was expressly to that effect, it must have been held to be in conflict with the Constitution, and therefore void.

But I repeat that if the construction of the Act of 1856 carries the exemption in the seventeenth section of the charters, it was perfectly competent for the Legislature to make such a grant.

In the Shields case, it is held that the Act was a grant—a *new* grant—of corporate powers: that the powers, &c., granted were not named in the act, but

were contained in the charters to which reference was made: that "it was made operative by reference. But this did not affect the legal result. A deed, *inter partes*, may be made as effectually by referring to a description elsewhere as by reciting in full in the present instrument. The consequence is the same in both cases."

Applying this language of the court to the present case, and admitting, for the sake of giving the opposite argument its full force, that this was a grant creating a new corporation, *the grant is of the two old charters as they stood* with the *fifteenth* and *seventeenth* sections still in them.

In case of the deed, the other instrument becomes as much a part of the deed as if such instrument were inserted in the deed. In the Ohio case, the charters were held to be as much a part of the Act as if inserted in the Act; so in this case, the charters are as much a part of the Act of 1856 as if they had been inserted in it. If they had been actually inserted in it, this question would never have arisen; but, *legally*, they are inserted in it, as much as if they had been *actually* inserted in it; and the result is the same.

We claim, then, that if the Act of 1856 is an Act of Incorporation, it is expressly provided in it, that our charters "shall not be revoked, annulled, altered, limited, or restrained without the consent of the corporation, except by due process of law."

The result is that sections *fifteen* of the charters continued in full force, and were in force when this

tax was assessed. And the law of 1876 by virtue of which it was assessed, therefore, conflicts with the charter.

In the Shields case, much stress is laid upon the proposition, that the dissolution of the old corporations preceded the existence of the new corporation. But by section four of the Act of 1856, it is expressly provided "*that nothing in this Act shall be construed as extinguishing said consolidated corporations, or annulling these charters.*"

[This section, as printed in the case, is not punctuated as in the *original law:* I have copied it correctly, as above printed. See Webb's Railroad Laws, p. 301.]

It goes further, and provides that they shall be "regarded as still subsisting so far as their continuance for the purpose of upholding any right, title, or interest, power, privilege, or IMMUNITY ever possessed, exercised, or enjoyed by either of them, may be necessary for the protection of the creditors, &c., * * or *of such new corporation.*"

These provisions bring the case within the scope of the decision in the Georgia case (92 U. S., 665), rather than of the decision in the Shields case.

3. The terms of the *second* consolidation in 1873 are exactly within the scope of the decision in the Georgia case, and is not affected by the Shields case.

The other Companies are merged in *and become a part of* the Maine Central: the stock of all the merging Companies disappears, and the Maine Central stock remains as the capital stock.

VII. It is proper for me to remark that the Supreme Court of Maine place stress upon section fourteen of the charter, holding that the performance of the duties therein enjoined are not performed and cannot be performed by the consolidated Company.

The charter requires the duty to be performed, and the Act of 1856 (Sect. 6) also requires the consolidated Company to perform all the duties to the State or individuals, required of either of the original Companies.

In regard to the statement that the consolidated Company *cannot* perform those duties, I have to say that that is a statement of a *matter of fact*, and that there is nothing in the record to justify the statement. I go further, and say that those familiar with the working of railroads know that it would be perfectly easy to comply with the provisions of the *fourteenth* sections of these charters.

We protest, therefore, that the position that the consolidated corporation is neither required nor able to do and perform the acts is not sustained by anything in this record.

CONCLUSION.

We say, then, that the Supreme Court of Maine erred in deciding that the Maine Central Railroad Company has no subsisting immunity from taxation, so far as that part of its railroad held under the charters of the Androscoggin and Kennebec Railroad Company and the Penobscot and Kennebec Railroad Company is concerned; and, therefore, that the judgment should be reversed.

IN THE

Supreme Court of the United States.

THE MAINE CENTRAL R. R. CO.,
IN ERROR,
vs.
THE STATE OF MAINE.

No. 953.

REPLY OF PLAINTIFFS IN ERROR.

By Josiah H. Drummond.

I. My friend argues that the legislature may repeal the act of 1856; that if it should do so the Maine Central Railroad Company would go out of existence, and therefore, as I understand him, the legislature can take away this immunity from taxation.

But even if we admit that the act of 1856 may be repealed and the existence of the consolidated company be thereby destroyed, it does not follow that the company, *while it does exist*, does not have immunities which the legislature cannot take away.

Suppose the legislature, for a valuable consideration, should grant to a corporation, whose charter it has a right to amend or repeal at pleasure, a parcel of real estate; it certainly will not be pretended that because the legislature has a right to repeal the charter, it may annul that grant of of real estate and revest the title thereof in the state.

So in this case, the immunity from taxation is not a *corporate power*, but is a grant in itself valuable, more akin to a grant of real estate than to a grant of corporate power, and it does not follow that a right to repeal corporate powers carries the right to repeal such a grant.

The original companies, by virtue of their irrepealable charters, had acquired property, real and personal, and this immunity from taxation, among other things. By the consolidation, authorized by the act of 1856, the title to all this property and the right to this immunity vested in the Maine Central Railroad Company, and I cannot perceive how the title to this property, or the right to this immunity, can be taken away directly, even if the act of consolidation may be repealed, by which the right was not created, but merely vested in the consolidated company.

II. But the counsel for the State also argues that certain duties were to be performed by the original corporations, as conditions precedent to the exemption from taxation, and he repeats the argument that the consolidated company is not required to perform and cannot perform those duties.

1. But the performance of the duties imposed in sections fourteen and fifteen of these charters is not a condition precedent to the exemption from taxation. Those duties are absolute, and are to be performed, and the tax (when the contingency in which it was payable should occur) is to be paid in any event. There is no connection between them and the exemption. To enforce the payment of the tax, the charter provided that the state might maintain an action. If the duties were not performed there was a remedy "by due process of law" in the courts and not in the legislature.

2. But it is not true that the consolidated corporation is not bound to perform the duties set out in sections fourteen and fifteen of the charters.

Section four of the act of 1856 expressly makes the consolidated corporation "subject to all the legal obligations now resting on them [the original companies] respectively."

Section six of the same act provides that the "new corporation is declared to succeed to such obligations and liabilities, and be held liable to pay and discharge all the debts and liabilities of each of the corporations, that shall be so consolidated, whether on contract or for misconduct or neglect, EITHER TO THE STATE or to individuals, or any municipal or other corporation." How can it be said, then, that this particular obligation, to enforce which the charter expressly gives the state an action, was released or excepted from the duties to be performed?

3. But it is said that the consolidated corporation *cannot* perform this duty. As before stated, this is a question *of fact*, and the proposition is not sustained by anything in this record.

But if the court may infer from their own knowledge what the fact is, the proposition cannot be sustained.

The income of a railroad is received from the fares of passengers and the tolls for freight carried by it; it is known precisely over what portion of the road every passenger and every pound of freight is carried; the amount of fare and tolls is regulated according to the number of miles of carry; so that it is known and entered on the books of the company what each particular part of the line earns. In the same manner the expenses of transportation are known; the repairs and expenses of stations, &c., are local; so there is no difficulty whatever in knowing and keeping the net income of any portion of the railroad.

III. It is also claimed that if the act of 1856 continued the immunity from taxation to the consolidated company, it was without consideration, and, therefore, the act was void.

My brother says that the *building* of the railroads was, perhaps, a sufficient consideration in the first place for this

immunity; but he asks what consideration we give for this immunity.

The reply is, that the building of the railroads was but a small part of the consideration; the company was not merely to *build* the railroad, but was to *maintain* and *operate* it as a public highway; and that the consideration (if any was needed) which we gave for this immunity is the performance *by us* of all the duties and obligations prescribed in the original charters.

If this was not a new grant, as we claim, the original consideration is sufficient; and if it is a new grant, the consideration for *all* the privileges, powers, rights, and immunities is the performance *by us* of all the prescribed duties and obligations. Until our charter is annulled "by due process of law" in the courts, the consideration exists and is sufficient.—*State vs. Noyes*, 47 Maine, 189.

IV. It seems clear to me, also, that my brother misapprehends the provisions of the act of 1856 relating to the keeping alive of the old charters and the old corporations. He argues that they are to be kept alive *only* for the protection of creditors. I submit that this view is entirely too narrow.

In the first place the act expressly provides "that nothing in this act shall be construed *as extinguishing said consolidated corporations or annulling their charters.*"

In the second place, if the words following the language I have just quoted can be construed as limiting that language, they do not limit it to creditors alone: the provision is "but they shall severally be regarded as still subsisting, so far as their continuance, for the purpose of upholding any right, title or interest, power, privilege, or *immunity* ever possessed, exercised, or enjoyed by either of them, may be necessary for the protection * * * *of such new corporation.*"

Now, here was an immunity possessed by both of the old companies, which we invoke for the protection of this "new

corporation;" and for this purpose the act expressly provides that the charters shall be upheld.

Again, note the language of the next sentence—"And the *separate* exercise of their respective powers, and the *separate* enjoyment of their respective privileges and immunities being suspended until the protection of such creditors or mortgagees shall require their resumption," &c.

It is not the *exercise* of their powers nor the *enjoyment* of their privileges and immunities which are suspended; but the *separate* exercise and the *separate* enjoyment thereof; clearly implying that the *joint* exercise and enjoyment as therein before provided are not expended but are in full force.

In the Georgia case it is held (92 U. S., 665), that "the consolidation of two companies does not necessarily work a dissolution of both, and the creation of a new corporation. Whether such be its effect depends upon the legislative intent manifested in the statute under which the consolidation takes place."

It is very certain that in this case it was not the "legislative intent" to dissolve these corporations nor to create a new one, except in the limited sense that the union of two corporations in one makes the latter a new one.

V. My brother also claims that the present company has but *one* franchise; but we say that it has as many franchises as there are charters under which it operates its railroads, precisely as a company has more than one franchise which has charters from different states and has railroads in those different states. I here use the term "franchise" as meaning its grant of corporate powers.

I think it does not need argument to show that if several franchises are taxed *in solido* when some of those franchises are not taxable at all, an action of debt cannot be maintained for the tax or any part thereof. Being assessed *in solido*, it cannot be apportioned by the court any more than rent can be apportioned.

VI. As to the point that the consolidation of companies having the exemption with companies having no exemption, places them all upon the same level, I have only to repeat that the proposition is in direct conflict with repeated decisions of this court.

We insist, therefore, that the present Maine Central Railroad Company has in full force the exemption from taxation contained in the charters of the Androscoggin & Kennebec and the Penobscot & Kennebec Railroad Companies; and that the law of 1874 is in conflict with this; and, therefore, that the judgments of the state court in these cases should be reversed.

JOSIAH H. DRUMMOND.

Supreme Court of the United States.

No. 953.

OCTOBER TERM, 1877.

THE MAINE CENTRAL RAILROAD COMPANY,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF MAINE.

ARGUMENT FOR THE STATE OF MAINE.

BY LUCILIUS A. EMERY, *Attorney General of Maine.*

Stephen Berry, Printer, 37 Plum Street, Portland, Me.

Supreme Court of the United States.

No. 953.

OCTOBER TERM, 1877.

THE MAINE CENTRAL RAILROAD COMPANY,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF MAINE.

ARGUMENT FOR THE STATE OF MAINE.

BY LUCILIUS A. EMERY, *Attorney General of Maine.*

This action was brought by the State of Maine, in its own courts, to recover a State tax assessed April 1, 1875, upon the "corporate franchise" of the Maine Central Railroad Company as it existed on that day. This tax was assessed pursuant to Chapter 258, of the Maine Laws of 1874. See appendix "A." This action is authorized by Chapter 115, of the Maine Laws of 1876, appendix "B." The counsel for the Maine Central Railroad Company kindly admitted that the tax was regularly assessed, and that all necessary acts were done by the State Officers, to fix the liability of the Company, if it could be made liable at all. The Company makes no technical objection, but rests

upon the brief statement filed with its plea,—that the statute of 1874 is in conflict with the provisions of its charter, and is a law impairing the obligation of a contract in its charter, and, hence, in conflict with the Constitution of the United States. There is no feeling of hostility between the State and the Railroad Company. Both have been desirous to have an early judicial determination of the question at issue between them. Both counsel have co-operated to this end.

The case for the State being *prima facie* admitted in the agreed statement, the burden is upon the corporation to establish the propositions of law and of fact contained in its special plea. The burden is upon it to establish that the Act of the Maine Legislature of March 4, 1874, is unconstitutional. It encounters in the outset presumptions most strongly against it; presumptions which require the clearest reasoning to overcome.

The presumption of the constitutionality of a Legislative Statute is everywhere held to be of great strength. All the judges and writers agree upon this. Chief Justice Marshall, in the *Fletcher v. Peck* case, 6 *Cranch*, 87, says, that to overturn this presumption the judges must be convinced, and "the conviction must be clear and strong." Judge Washington, in *Ogden v. Saunders*, 12 *Wheaton*, 270, declared that if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory vindication of an opinion in favor of the constitutionality of a statute. Chief Justice Mellen, of Maine, in Lunt's case, 6 *Maine*,

413, says, "the Court will never pronounce a statute to be otherwise (than constitutional), unless in a case where the point is free from *all* doubt."

To establish the proposition of the unconstitutionality of the Statute taxing their franchise, the corporation must, under its plea, establish several subsidiary propositions. It must convince the Court, against strong presumptions, that the State of Maine had previously made a contract with this corporation in its charter, never to tax its franchise—that this contract was of such a nature that the State had no power of revocation—and that the Statute of 1874 impairs that contract.

It must establish the contract; it must establish its irrevocable character; it must establish its impairment by this Statute. It must do all this fully, clearly, and beyond all doubt.

In undertaking to establish the existence, in its charter, of a contract to exempt it from the power of taxation, it meets at the beginning a presumption of no less weight and power than the general one already invoked. This is the presumption against the intention of a Legislature to surrender the power of taxation.—a power so essential to the existence of the State. The Courts are emphatic in declaring that the language in which the surrender is made, must be clear and unmistakable. Justice Hunt says as much in *Erie Railway Company v. Pennsylvania*, 21 *Wallace*, 492. Justice Swayne, in *Tucker v. Ferguson*, 22 *Wallace*,

527, 575, says: "But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require." The Missouri Court, in *St. Louis v. Boatman's Ins. and Trust Company*, 47 *Mo.*, 155, say: "Every presumption will be made against its surrender, as the power was committed to the government to be exercised, and not to be alienated." Judge Davis, in *Bailey v. Magwire*, 22 *Wall*, 215, says: "The language used must leave no room for controversy." There is every reason for such a presumption. Such is the selfishness of human nature, that without the power of taxation, universal, inherent, and unceasingly present, in the government, it cannot exist for a day. To suspend the power is to dissolve society.

With these formidable and obstinate presumptions combatting them unceasingly at every move, the members of this corporation have also to encounter and surmount Chapter 503 of the Maine Laws of 1831, which enacted "that Acts of Incorporation which shall be passed after the passage of this Act, shall at all times hereafter be liable to be amended, altered or repealed at the pleasure of the Legislature, in the same manner as if an express provision to that effect were therein contained; unless there shall have been inserted in such Act of Incorporation an express limitation or provision to the contrary."

R. S. of Maine, c. 46, s. 17.

All the legislation of Maine and all her Acts of Incorporation having any relation to any part of this corporation have been after the passage of the Act of 1831. This Act, in all its entirety, is a part of all charters, amendments, Acts and legislative contracts, which this corporation may invoke as if it had been specifically inserted in each. This proposition hardly needs argument. The Act itself says "in the same manner as if an express provision to that effect were contained in the charter." This power of revocation is in every chapter and section of all the subsequent legislation of Maine in relation to corporations. It permeates every clause. If there be not accompanying the legislative Act, and inserted therein, "an express limitation or provision to the contrary," such Act may be utterly repealed. Every legislative contract not having inserted therein such an express limitation can be utterly revoked at once, or after long years. This limitation cannot be implied. Inferences, however strong, are of no avail. The limitation or provision must be express, and it must be expressly and actually in words inserted in the charter. It cannot be added afterward. It must be inserted in the Act of Incorporation. It is of no avail if expressed elsewhere, or in any other Act. It must be in the contract itself—not in any other place whatsoever. Unless this express limitation or provision be found in words in the Legislative Act creating this Maine Central Railroad Company, then any alleged contract of exemption from taxation can be annulled at pleasure, without repugnance to the United States Constitution.

This proposition is fully sustained by authority. In *Tomlinson v. Jessup*, 15 *Wallace*, 454, 458, Judge Field said, when immunity from taxation constitutes a part of the contract, "It is by the reservation of the power such as is contained in the law of 1841 (a similar one in South Carolina), subject to be revoked equally with any other provision of the charter, whenever the Legislature may deem it expedient for the public interests that the revocation shall be made." This was also expressly decided in *West Wisconsin Railroad v. Supervisors of Trempalean County*, 35 *Wis.*, 257, and in *Union Improvement Company v. The Commonwealth*, 69 *Pa. St., R.* 140, both of which were cases of the imposition of a tax in spite of an alleged charter exemption.

The counsel for the Company must now show from this record evidence of such a contract as will overbear and beat down these presumptions and this statute. Counsel points us to the 15th and 17th sections of the charters of the Androscoggin & Kennebec Railroad Company, and of the Penobscot & Kennebec Railroad Company, both chartered in 1845, which sections are given in full on pages 6, 7 and 8 of the record. Section 15 provides for a taxation of the real estate and of the shares, and then stipulates as follows: "But no other tax than herein is provided shall ever be levied on said corporation or any of their privileges or franchises." This is clearly a promise not to assess upon either of these corporations such a tax as is sought to be recovered here.

To avoid the effect of the Act of 1831, counsel points to the concluding clause of section 17. "This charter shall not be revoked, annulled, altered, limited or restrained without the consent of the corporation, except by due process of law." This is strong language, but it is not the language of the statute of 1831, and makes no reference to that statute. But there is no occasion for me to urge this point. ~~Similar language is found in the charter of the Somerset & Kennebec Railroad Company.~~ Nowhere else in any of the charters of any of the roads making up the Maine Central Railroad Company, is there any language that can be tortured into a contract.

To all this statement and argument of counsel there is the evident answer, that this suit is not brought to recover any tax upon either the Androscoggin and Kennebec, or Penobscot and Kennebec, or the Somerset and Kennebec Railroad Companies. No tax has been assessed upon either of them, or upon any of the franchises or privileges of either of them. This suit is against the Maine Central Railroad Company to recover a tax upon the corporate franchise of that Company. We are not pursuing any other Company in this suit, nor in any way striving to reach the franchise of any other Company.

To be sure the Maine Central Railroad Company was first formed out of the Androscoggin and Kennebec Railroad Company, and the Penobscot and Kennebec Railroad Company. This was done by an agreement made August 20, 1862, being Exhibit "A," on page

13 of the record. This agreement was authorized by the Act of 1856, given on page 8 of the record. It is claimed on the part of the State, however, that the Maine Central Company is none the less a different and distinct corporation, from either the Androscoggin and Kennebec, or the Penobscot & Kennebec.

A corporation can be as easily created by the union of corporations as by the union of natural persons. Such a corporation is as distinct an entity, as distinct and different from those of which it is composed, as other corporations are distinct from the natural persons of whom they are composed. The Legislative Act, creating a new corporation by the union of old corporations, is a new Act. It is an Act distinct from any Act incorporating the old corporations. The new corporation is created by the new Act. It has no existence prior to that Act. It has an existence after that Act. This position is supported by authorities. In *Bishop v. Brainerd*, 28 *Conn.*, 289, it was assumed by Counsel and Court, and stated, that a State may as well create a new corporation out of two or more corporations created by the same State, as well as of two or more natural persons. The same was done in *Hamilton Mutual Insurance Co. v. Hobart*, 2 *Gray*, 543, and in *Com. v. Atlantic and Great Western Railway*, 53 *Pa. St.*, 9.

The Maine Central Railroad Company that came into existence in 1862 was not merely the Androscoggin & Kennebec Company *plus* the Penobscot & Kennebec Company. It was not a revival nor a continua-

tion of those corporations. By the very terms of the Act creating it, the Act of 1856, it was to be *one* corporation. It is called in that Act a *new* corporation. It was to take a new and different name. It was to have a single and different Board of Directors. In the fourth section is the express mandate that the two former "shall together constitute the new corporation." In the fifth section it was provided that all rights, franchises and property of the old corporations "shall be deemed to be transferred to and vested in such new corporation." The distinct and independent existence of the new corporation is made apparent in the proviso in the fourth section, that the old corporations shall retain an existence, though in an attenuated form, for a single purpose, the protection of their creditors.

This new corporation derived its existence from the only source that could give it life—the Legislature. No acts of the two prior Companies could have created it. No transfers of franchise are recognized by the law until the Legislature makes the transfer. This new corporation was not organized until 1862, but the sole source of, and authority for its existence was the Legislative Act of 1856. That Act made its being possible. It was and is the very breath of its nostrils. Assuming that it can be repealed, such repeal would dissolve it. The simple words, "The Act of 1856 is hereby repealed," would puff away into air this new corporation. The franchise of this new corporation was not conferred upon it by the old Companies. It was conferred by the Legislature. The old corporations were incorporated in 1845; the new one in 1856.

The Act of 1856 proposed to make a new corporation out of the two corporations before named, and to transfer to the new corporation all their rights, property and *franchise*. The two old Companies accepted the proposition and organized the new corporation. They thereby gave up their rights, property and *franchise*. They no longer had rights, property or *franchise*. They had no existence for active duties. Their organization was gone. They had no President nor Directors. These old Companies could not give their franchise of their own will to the new Company. They gave up their franchise, their charters to the Legislature, to be by it conferred upon the new corporation. The franchise had to go back to the Legislature to be born again. This new corporation was a new birth, and we believe this time without the sin of exemption from taxation.

This view is sustained by authorities. In *State v. Sherman*, 22 *Ohio, St.* 411, it was held that a transfer of a franchise is in legal effect a surrender to the Legislature, and a grant by the Legislature of a similar charter to the transferees, and the new grant is subject to the constitution and laws in force at the time it was made, in spite of any exemptions when the franchise was first granted. The Court say: "It (the charter) must pass through legislative hands before it can take life in a new organization," which is just my proposition. In *McMahan v. Morrison*, 16 *Indiana*, 172, three corporations consolidated under an act of the Legislature authorizing them to merge and consol-

idate their stock "and make one joint company." It was held that the effect of the Act and of the consolidation under it, was a dissolution of the three corporations and the creation of a new one, with property, liabilities, and stockholders derived from those passing out of existence. These views were sanctioned by the Supreme Court of the United States, in *Clear Water v. Meredith*. 1 *Wallace*, 25, 40.

It is evident, therefore, that we must look into the Act of 1856, incorporating the Maine Central Railroad Company, for any contract that is to prohibit the State from subjecting this corporation to its due proportion of taxes. If there be any such contract it must be in that Act, and not in any Acts of 1845 incorporating the old companies. The contract is not to be implied merely; it must be *expressed* in the Act of 1856. It must be expressed in clear and unmistakable terms—terms so clear and unmistakable that there is no escape from their evident meaning. Such is the tremendous presumption established by the authorities before cited against the existence of such contracts.

I think no such contract expressed in terms will be found in any part of the Act of 1856, or any Act in relation to the Maine Central Railroad Company. The counsel can only cite the following clause in the 4th section: "And such new corporation shall have all the powers, privileges and immunities possessed by each of the corporations entering into said agreement." This language does not come up to the standard established by the authorities. It does not at once break

down all adverse presumptions, and compel assent to the proposition of the existence of such a contract. It seems to require some argument, where argument should be supererogatory. We are asked to infer in a matter where inference has no place, but only explicit unequivocal assertion. There is no reference to exemption from taxation. The Supreme Court of Tennessee, in *East Tennessee, Virginia and Georgia R. R. v. Hamblen County*, 4 *Law and Equity Reporter*, 465, had similar language under consideration, differing only in the word "rights" instead of "immunities." The language in that case was "rights, powers and privileges." The court held that such language did not confer upon the second corporation the exemption from taxation possessed by the first.

The Legislature could not have intended to confer exemption on this Maine Central Railroad Company. When it provided a specific mode of taxation for the Androscoggin and Kennebec Company, and the Penobscot and Kennebec Company, and covenanted never to tax them in any other way, it required of them certain duties. Their exemption was qualified by those duties. The Directors of each, by section 15 of each charter, were required to keep accounts of the expenses and earnings of each road, and make special report to the Legislature when the earnings were ten per cent. per year upon the cost. If the Directors couldn't or wouldn't do this, the Company would be obliged to submit to some other form of taxation. So of the Treasurer. Now each of these corporations of

1845 surrendered their franchise to the Legislature. They gave up their organization. They no longer have Directors nor Treasurer to make report and pay over. They were entitled to this exemption only so long as they stood ready to perform this attendant duty. The moment they incapacitated themselves from such performance they lost their exemption. The new Company couldn't perform this duty for them. The assets of the two old corporations have become intermingled. They run continuous trains over the whole length of both roads. No separate accounts are kept. No mutual accounts are kept any more than one mile with another. All is common. It cannot be told which mile has earned a given sum. But even if they could do it, the State would not be bound to receive it from them. The State's contract was with the two old Companies. By that contract the Directors and Treasurers of those Companies were to perform these duties. The State need not accept performance from anybody else. When the State released these two corporations from that duty and allowed them to dissolve, it never intended to continue their exemption. The State cannot be held to have so intended unless the language is compelling.

But suppose the language does clearly, directly and unequivocally *express* in terms a promise of exemption. There is still lacking a prime essential of a contract. An actual, tangible consideration is as essential to a contract between a State and a corporation, as to any other contract. Especially does a promise to sur-

render the taxing power require a plain, visible and adequate consideration. In *Jones Manufacturing Co. v. Commonwealth*, 69 *Penn. St.*, 137, it was held that the right to tax is never presumed to be surrendered except by clear words, and for what the Legislature deems an adequate consideration. In *St. Louis v. Boatmen's Ins. and Trust Co.*, 47 *Mo.*, 150. 155, the court use this language: "A law which seeks to deprive the Legislature of the power to tax, must be so clear, explicit and determinate, that there can be neither doubt nor controversy about its terms or the consideration which renders it binding." In *Tucker v. Ferguson*, 22 *Wallace*, 527, it was decided that an Act of the Legislature exempting property of a railroad from taxation is not a contract to exempt it, unless there be a consideration for the Act. The court further say, "An agreement when there is no consideration is a nude fact, the promise of a gratuity spontaneously made, which may be kept or recalled at pleasure, and that this rule of law applies to the agreement of States made without consideration as well as to those of individuals." In *Christ Church v. Pennsylvania*, 24 *Howard*, 300, an Act exempting certain property of Christ Church Hospital from taxation was held to be a gratuitous concession, and as no service or duty, or other remunerative condition, was imposed upon or undertaken by the corporation, the concession might at any time be revoked by the State.

For the promise made to the two old corporations there may have been a consideration. The stockholders

were to build railroads in the State, which were to be public highways: the Androscoggin and Kennebec from Danville to Waterville, and the Penobscot and Kennebec from Waterville to Bangor. What were the stockholders of this new corporation, the Maine Central, to do, in return for this claimed promise of exemption in the Act authorizing the existence of the Maine Central? The burden is on them to point out the consideration from the agreed facts. They must prove the contract, and that includes proof of the consideration.

This new corporation built no railroad. It expended no money. It does not appear that the State gained anything by this consolidation, or new incorporation. The Act was one conferring a benefit on the stockholders of the two old corporations, by permitting them to surrender their old franchises, and take a single new franchise. It was for their convenience. It enabled them to operate their several roads with less officers, and less cost. To attain this end, they gave up the old charters and received the new. There was no gain to the public, and no loss to the stockholders—no advantage to the one, nor inconvenience to the other. Unless they can show new burdens upon them, or greater good to the State, they can claim no binding contract, for want of consideration.

But suppose there was a promise expressed, and a valid consideration for such promise—the State reserved, by the Act of 1831, full liberty to revoke and annul the promise at pleasure. The Act of 1831, as

already shown, was an essential part of every subsequent Act of Incorporation. It was as much a part of the Act of 1856, incorporating the Maine Central Railroad Company, as if specially and expressiy contained therein. Under that Act of 1831, the right of the Legislature to annul or repeal is always to be presumed and assumed in construing every subsequent Act. The burden is on the other side to show the exception. They cannot show any exception, and there cannot be any exception "unless there shall have been inserted in the Act of Incorporation an express limitation or provision to the contrary." It is not enough to show that the exception is clearly implied; it must be expressed. No inference, however strong, will avail. There is no room for reasoning—no room for even a single step in the logical process. The limitation must be expressed, directly and in terms.

The words "powers, privileges, and immunities," in the Act of 1856, incorporating the Maine Central, I have argued, do not express any contract of exemption. The mind does not at once, upon the reading, give them that meaning. It requires argument, reasoning, logical deductions to show that they have such force and effect, assuming that to be the fact. Much less would the mind upon the first reading of the same words, at once see that they exclude the operation of the Act of 1831. More argument and reasoning and deductions would be required to convince the mind that these words possess such extended meaning. This very need of argument is proof that there is no "ex-

press limitation" inserted in the Act of 1856. That must be apparent without argument.

It will not avail to point to the limitations in the Acts of 1845, incorporating the old Companies. Reference to a limitation in some other Act is not sufficient. No limitation elsewhere expressed will do. The limitation must not only be "express," but must be "inserted in the Act of Incorporation." But in this Act of 1856 there is no such reference. No mention is made of any limitation in the prior Act. The words "powers, privileges and immunities," do not clearly and apparently include "limitations." They do not really include it.

It must be apparent that the Legislature, in passing the Act of 1856, intended to exclude the operation of the Act of 1831. Further, it must be apparent that the Legislature made that intent manifest in the prescribed mode, by inserting an express limitation in the Act itself. The clear appearance of the intent is not enough. It must as clearly appear that the prescribed words were used. The intent must only appear in the prescribed way. Each proposition must be too clear for argument; and if either is not perfectly clear, the whole fails.

As to the effect of this consolidation of 1862 upon the claim of exemption in the charters of the Androscoggin and Kennebec and Penobscot and Kennebec Companies, assuming such claim by them to have been valid, we say:

1. The Act of 1856, followed by the consolidation of 1862, created a new and distinct corporation.

2. There is not plainly expressed in the Act of 1856—the charter of the Maine Central R. R. Co.—a contract of exemption from taxation for that company.

3. The Legislature did not intend to continue the exemption of the old companies, as they relieved them from the duty of making report, and, in effect, allowed them to dissolve.

4. Assuming there is a promise of exemption plainly expressed in the Act of 1856, it was not binding on the State, for want of consideration.

5. Assuming the promise and the consideration, there is not in the Act itself any express limitation against the Act of 1831, and consequently the Legislature has reserved the right of recission.

Perhaps I can concisely express my main proposition by an illustration drawn from chemical science. Hydrogen and oxygen, each, claims a seeming exemption from the law of gravitation, being lighter than air; but when they are combined in certain proportions they form a new substance, water, which is under full subjection to the general law. These old companies, with their claims of exemption, went into the Legislative crucible, to combine and come out a new organization, subject to the law.

But this is not all: as if to still further free itself from an exception so obnoxious to the people, this

new organization itself went into the legislative crucible, there to combine with three other organizations, some of which had no taint of the exception, and with them received from the Legislature a new life, a new franchise. These three were the Portland and Kennebec, the Somerset and Kennebec, and the Leeds and Farmington. The charter and history of each should be examined.

Referring to the record, page 10, there was incorporated in 1836 the Kennebec and Portland Railroad Company, which was afterward organized, and which constructed a railroad from Augusta to Portland. In this charter there was no limitation upon the right to tax, ~~nor any limitation, express or implied, against the statute of 1831.~~ In 1845, by Chapter 273, section 3, the right to tax was limited to the surplus over ten per centum per annum, as in the charters already considered. This limitation was put on afterward, and was not in the Act of Incorporation; hence, the Act of 1831 controls that charter.

This corporation mortgaged its road and franchise, and was defaulted. The mortgagees foreclosed, and in 1862 took possession, under the provisions of Chapter 51, of the Revised Statutes of 1857. Section 57 of that Chapter provided that, if the foreclosure be effectuated, the mortgagees, their successors, &c., "are hereby constituted a Company incorporated and chartered as of the day of the foreclosure," * * "with all the chartered and legal rights and immunities" of the original Company. By section 58, provision is made

for the organization, and the Company is called "this new corporation, though a distinct one." By section 60, the old corporation was continued solely for purpose of collecting and paying debts. The mortgagees organized under this Chapter, taking the name of Portland and Kennebec. It is clear that this Portland and Kennebec was a new and distinct corporation, deriving its existence from the Legislative Act of 1857, Chapter 51. The stockholders are different.

All the arguments against the theory that the exemption of the Androscoggin & Kennebec, and Penobscot & Kennebec, passed to their successor, the Maine Central, and was irrevocable in the latter, apply much more strongly to the theory that this corporation of mortgagees took any exemption from the original corporators. There is no such exemption expressed in the Statute, under which they organized. There was no consideration.

Further, the old corporation was abolished except so far as debts were concerned, and a tax is not a debt. There was no corporation left to pay over any surplus.

Further, the Act of 1831 was re-enacted in the same Revised Statutes of 1857, in Chap. 46, Sec. 17, and was re-enacted in the same revision under which the Portland & Kennebec was incorporated. Not only then was there no express limitation against it, but the Statute was re-affirmed. These chapters were enacted at the same time. They must be construed together. They both apply to corporations. There can be no

doubt that Chapter 46 applies to and affects Chapter 51. In regard to this Company, then, we claim:

1. That there was no limitation of the right to tax in the charter of 1836, and that the afterward promise of exemption in 1845, not being in the charter, did not destroy the effect of the Statute of 1831.

2. In any event, the new corporation had no such exemption in the laws under which it organized, and the provisions of the Act of 1831 would destroy any such claim if such existed.

Referring to the Record, pages 10 and 11, there was incorporated in 1848 the ~~Leeds and Farmington~~ Androscoggin Railroad Company, which organized and built a railroad from Farmington to Leeds Junction. This Company also mortgaged it road and franchise, and failed to pay. The mortgagees foreclosed under the same statute as did those of Kennebec and Portland. This was done in 1865. The new corporation was called the Leeds and Farmington. The original charter contains no words of exemption. The new stockholders can claim none, for the reasons given when speaking of the Portland and Kennebec. This is clinched, however, by the Act of 1864, chapter 238, section 4. It was then enacted that "Every railroad corporation that shall be formed by the foreclosure of a mortgage of any railroad heretofore or hereafter made, shall be subject to such laws as the Legislature have enacted or shall hereafter enact concerning railroads, anything in the original charter to the contrary notwithstanding." The Leeds and Farmington was formed in 1865.

The Somerset and Kennebec, incorporated in 1848, built a railroad from Augusta to Skowhegan. Its charter was similar to that of the Androscoggin and Kennebec, except the limitation,

Here, then, were four railroad corporations. The Maine Central, organized in 1862, under the Act of 1856; the Somerset and Kennebec, organized under the charter of 1848; the Portland and Kennebec, organized by foreclosure proceedings in 1862, under R. S. of 1857, c. 51; the Leeds and Farmington, organized in 1865, under R. S. of 1857, c. 51. The last two were admittedly without the least claim to any exemption from taxation.

The Legislature, by Chapter 383 of the Laws of 1873, authorized these last three Companies to consolidate with the Maine Central and form one corporation, upon the principles and terms and in the manner named in the Act of 1856. These Companies effected such consolidation November 16, 1874. Exhibit "B."

This new consolidated Company has the same name as one of its constituents, but it has a new grant of franchise. The old Company owned and operated a road from Danville to Bangor only. The new Company owns lines of railroad from Portland at one extremity of the State to Farmington in one direction, to Skowhegan in another, and to Bangor in another. It did not purchase these lines. There was no instrument of transfer made. The stockholders of the old Maine Central acquired no new property. The stock-

holders of the other three Companies sold no property. The stockholders of each of the four Companies became stockholders in a new corporation. They thereafter managed all the lines and held all the property under one franchise, not under four. They have one government and one treasury. All the earnings from Portland to Augusta, Skowhegan, Danville, Farmington and Bangor are received and held by one Company, under one charter. It was no partnership that was formed, but a consolidation; not a confederation, but a nation. The four franchises were transferred to a common successor, and became one franchise of one Company. This was done by legislative action. To quote the Ohio Court, they passed through legislative hands and took life in a new organization.

This is seen more clearly by reference to the Act of 1856, which is adopted by the Act of 1873. By section 4, the agreeing corporations were to be consolidated, and "constitute a *new corporation*." By section 5, all and singular the rights, franchise and interest of the several corporations, in all kinds of property, "shall be deemed to be transferred to and vested in such *new corporation*." The agreement of 1874 was made under the Act of 1856, though authorized by the Act of 1873. By Art. 5 of this agreement, the Companies adopt sections 5, 6, 7 and 8 of the Act of 1856, as applicable to a new corporation.

This new corporation, organized November 16, 1874, cannot effectively claim any exemption from taxation. It can only claim it by force of the Act under which it

was organized. No such exemption is expressed in the Act of 1874, nor Act of 1856. The counsel relies upon the reference in the Act of 1856 to the Acts incorporating the first two constituents. This reference is in the most general language. It is a well settled principle that an Act creating a corporation, with powers and privileges of another corporation formerly created, by reference, without setting them forth, should be construed strictly against the corporation. *Bowling Green Railroad v. Warren County Court*, 10 *Bush*, 711; also the Tennessee case before cited, *Railroad v. Hamblen County*, 4 *L. and E. Reporter*, 465. I have already shown how much more strict this construction must be when the essential sovereignty of the State is sought to be evaded.

By the Act of Consolidation, the new corporation is to "have all the powers, privileges and immunities possessed by *each* of the corporations entering into the agreement." The Act does not say that the new corporation shall have all possessed by any one of the constituents. "Each" means "every one of any number separately considered." "Each" does not mean "any one" of a number. "All" means "every one of the particulars"—"the whole number." Now, when a grant is made of powers, privileges and immunities of each of the old corporations, it may carry the powers, privileges and immunities which every one of them all had, but it certainly excludes those special privileges which only some of them had, and which others of them had not.

Immunity from taxation was not possessed by every one of the constituents. At least two confessedly had no such immunity. This, therefore, is not an immunity which the new corporation can claim, as it was not an immunity of each; was not common to all of the constituents.

This is illustrated by the rule of law affecting judgments where a creditor combines privileged claims with others less privileged, in the same suit or judgment; as, for instance, a lien claim with a non-lien claim. In such case the creditor loses the advantage of the lien. He reduces those claims of higher privilege to the grade of those of lower privilege. *Bicknell v. Trickey*, 34 *Maine*, 273. *Miller v. Scherder*, 2 *Comstock*, 262. So here the constituents, with unequal privileges, consolidated voluntarily. They have merged their property, rights, franchises and organization into a common whole. Those who had the privilege have disabled themselves from complying with the condition, to wit, the return of the earnings. They surrendered their charters. They took a new one, in consolidation with other Companies which the State had the right to tax. The surrender of their special charters carried with it the surrender of the exemptions. In granting the new charter, the State made no surrender of its sovereign power of taxation.

Those cases in which it has been held that the consolidation was not a surrender of the old charters, and the taking out a new charter, will be found to vary materially from this case in circumstances, and especially

in the language of the Acts authorizing the consolidation. In *Tomlinson v. Branch*, 15 *Wallace*, 460, the stockholders of the S. C. Canal and Railroad Company exchanged their stock for equal stock in the South Carolina Railroad Company, by which means the latter Company acquired the control of the former, and used the road of the former Company from Branchville to Charleston. The latter Company obtained the franchise and property of the former by *purchase* of its stock. The Legislature afterward legalized this absorption in Act of which the following is one section:

"That whenever the written consent of all the stockholders of the South Carolina Canal and Railroad Company shall have been obtained, the said South Carolina Canal and Railroad Company shall be merged in the said South Carolina Railroad Company, and, thereupon and thereafter all the rights, privileges and property belonging to the said South Carolina Canal and Railroad Company shall be vested in the said South Carolina Railroad Company, and the said South Carolina Railroad Company shall be liable for all the debts and contracts of the said South Carolina Canal and Railroad Company; and the stock and property of the said South Carolina Railroad Company shall be subject to the same liens and charges to which the stock and property of the said South Carolina Canal and Railroad Company may be liable, and in the same relative order in which the said liens and charges now stand."

This Act recognized the continued existence, without change, of the South Carolina Railroad Company. The property of the other Company is transferred to this. There are in the Act no words about a "new corporation"—no transfer of the property of the two

old corporations to the new corporation. The Act simply permitted the South Carolina Railroad Company to purchase the stock of the other, and run the whole under its previous charter. A comparison of the South Carolina Act of 1843, with the Maine Act of 1856, will clearly show the very different intent of the two Legislatures.

But in the South Carolina case, the exemption was confined to that road originally exempt. The old franchise could not be stretched to cover any more.

Humphrey v. Pegues, 16 *Wallace*, 244, was not a case of consolidation, but simply a case of the incorporation of a new Company and conferring upon it the same powers, rights and privileges that had been before conferred upon another Company. It was as if the language of the charter to the first had been incorporated in the charter of the second. In this case the second road was not the successor of the first.

In the *Delaware Railroad Tax*, 18 *Wallace*, 206, the decision was simply that the proposed tax was not a violation of any contract with the consolidated company. The Delaware Act of Consolidation, however, makes no mention of a *new* corporation. It says that "the stockholders of the two Companies should, when consolidated, have all the powers, &c., of the Companies, *or either of them*," &c. This is different language from that we have been considering.

In *Central R. R. Co. v. Georgia*, 92 U. S., 665, the court state that the Legislature "authorized the union

and consolidation of the 'Central Railroad and Banking Company of Georgia,' and the Macon and Western Railroad Company, under the name and *charter* of the first named." The 1st and 4th sections of the Act were as follows:

"Be it enacted by the General Assembly of the State of Georgia, that the Macon and Western Railroad Company and the Central Railroad and Banking Company of Georgia be and they are hereby authorized and empowered to unite and consolidate the stocks of the said two Companies, and all the rights, privileges, immunities, property and franchises belonging or attaching to said Companies, under the name and charter of the said 'The Central Railroad and Banking Company of Georgia,' in such manner that each and every owner and holder of shares of the capital stock of the Macon and Western Railroad Company shall be entitled to and receive an equal number of shares of the capital stock of the consolidated Companies: provided, that nothing herein contained shall relieve or discharge either of said Companies from any contract heretofore entered into, but that all such contracts shall be assumed by, and be binding on, the Central Railroad and Banking Company of Georgia, and all benefits and rights under the same shall accrue to, and vest in, the said last mentioned Company: and provided further, that, upon such union and consolidation, the capital stock of the Central Railroad and Banking Company of Georgia shall not exceed the amount of the authorized capital thereof and the present authorized capital of the Macon and Western Railroad Company added thereto."

"Be it further enacted, that upon the union and consolidation herein provided for, each stockholder in the Macon and Western Railroad Company shall be entitled to receive a certificate of stock as a shareholder in the Central Railroad

and Banking Company of Georgia for a like number of shares, upon the surrender of his certificate of stock in the former Company, which new certificate shall entitle the holder thereof to the same rights, privileges and benefits as attach to the holders of stock now held by the shareholders in said Companies, or either of them."

It will be seen they were to unite and consolidate the *stocks* of the two Companies under the name and *charter* of the said "Central Railroad and Banking Company of Georgia." This is an express continuation of that charter. That charter was not surrendered, but continued. Further, while the stockholders of the Macon Company were to receive equal numbers of shares in the consolidated Company, the stockholders of the Central were to retain their stock without change. There was no change whatsoever made in the *status* of the Central Company, none in the situation of the Company or of its stockholders. There was no transfer made of anything to any new, or any consolidated corporation.

On the other hand, the Maine Act expressly speaks of the consolidated corporation as a *new* corporation, and transfers all the rights and properties of *all* the constituents to the new corporation. Neither of the constituents, especially under the first consolidation, is left unchanged. On the contrary, their substance is abolished, and only their ghosts left.

In this Georgia case, Judge Strong says: "If the Central Railroad and Banking Company is a new corporation, enacted when it united with the Macon and

Western Railroad Company, the consequences claimed by the State might and probably would follow." He further says, whether the result of a consolidation be a new corporation, depends upon the wording of the statute.

In all these cases, and in *Chesapeake Railroad Company v. Virginia*, it was explicitly declared that an immunity held by one constituent of a consolidation did not pass to the other constituents, nor to the consolidated Company, except as to the property of the exempt constituent. In all these cases, too, the tax was assessed upon property, or stock, or earnings.

The tax sued for in this suit is a tax upon the "corporate franchise." It is a tax upon such corporate franchise as the Maine Central Railroad had upon the first day of April, 1875. The franchise taxed, is that by authority of which the Maine Central Railroad Company on that day was owning roads and running trains and taking tolls from Portland to Lewiston, to Augusta, to Farmington, to Skowhegan, and to Bangor. This franchise was conferred upon them by the Act of 1873, adopting the Act of 1856. Before that Act of 1873, the corporation then called the Maine Central could only own roads and run trains from Danville to Bangor. Before the Act of 1873, there was no franchise for any one to own the roads and run the trains now owned and run by the present Maine Central. As before said, this Company has one government, one treasury, and one franchise, for the exercise of these vast powers. The tax is single, and upon a single franchise. There

is but one living, active franchise to assess; the others are surrendered or in suspense. It is not a tax upon the property, nor earnings, nor receipts, nor shares, of the Company. The Governor and Council were not to hunt up property to tax; they were to tax the franchise, one and indivisible. The Company have but one charter. The language of their plea is strictly accurate. They allege that the tax "is in conflict with the provision of their charter," and that the statute of 1874 impairs "the obligation of a contract in their charter." They have but one charter. They plead but one charter. This charter they hold of the State. For this charter they are required to pay tribute.

They point to no exemption in this charter. They point to five other charters, now suspended and valueless. In some of these they admit they have no exemption. Their proposition then is, that the leaven of exemption in part has leavened the whole lump—that this leaven has passed into all the Companies, and all the charters. They would have us believe that this claimed exemption, like the genie in the Arabian Nights' tale, has silently extended and expanded, until a powerful corporation, combining five prior railroads, almost spanning the State with its iron lines, and bearing up with its franchise millions of property, is enveloped within its folds, and under its protection can defy the sovereignty of the State that gave it life.

The Courts are emphatically against such a proposi-

tion. The cases already cited, from 15 *Wallace*, 16 *Wallace*, 18 *Wallace*, 92 *U. S.*, are dead against it.

Their alternative proposition, then, is, that they are partially exempt. If so, it is for them to make the division. They must show what is exempt, and submit to judgment for what is not exempt. If the part claimed to be exempt is exempted in consideration of certain returns to be made to the Legislature, they must make those returns. If it be their duty to keep accounts of certain portions of their lines, distinct from others, in order to show the Legislature when the ten per cent. is reached, that duty they must continually perform. That duty they have not performed. They do not claim to have performed. They have intermingled the goods, and they must pick out their own at their peril.

Mayor v. Batter, 1 Barb. 325, An action of debt does not necessarily imply the whole or none. If anything be due, judgment can be rendered for that. If it be the duty of this Company to pay any tax assessed on their corporate franchise, or any part of such tax, it can be recovered in this form of action. Until the Company, however, show what discount should be made, where the dividing line is, judgment must go against them for the full amount.

We deny both of these alternative propositions. We say, in brief, that this charter of this Company now sued, whether it originate in the Act of 1856 or the Act of 1873, contains no express contract of exemption, and has not "inserted therein an express

limitation or provision to the contrary" of the Act of 1831, giving the State full power to repeal. All the subsidiary propositions I have advanced and discussed result in this conclusion. All these propositions and this conclusion have been sustained by the unanimous concurrence of all the sitting judges of the Supreme Court of Maine, a court of deservedly high repute for ability, learning and independence. 66 *Maine*, 485.

In showing the error of that decision of the Supreme Court of Maine, the counsel for the Company has to overcome or explain away many judicial authorities, to surmount or beat down high and strong presumptions that are continually rising in his path, to clear away and dissipate clouds of doubt that are continually and persistently settling in his way. I have felt the logical power and persuasive eloquence of the distinguished counsel, but he cannot have overcome every presumption and dissipated every doubt resting upon his case. If there is a doubt left, the State must have the benefit of that doubt, and consequent judgment in its favor.

L. A. Emery.

APPENDIX.

A.

Laws of 1874, Chapter 258.

An Act relating to taxation of railroad companies.

Sect. 1. Every railroad company incorporated under the laws of this State, or doing business therein, shall annually, between the first and fifteenth days of April, return to the Secretary of State under the oath of its Treasurer, the amount of the capital stock of the corporation, the number and par value of the shares, and a complete list of its shareholders, with their places of residence and the number of shares belonging to each on said first day of April. The returns shall also contain a statement of the whole length of its line, the length of so much of its line as is within the State, and the assessed value in each town of its depots and other property taxed by municipalities.

Sect. 2. The Governor and Council shall ascertain the true market value of the shares of each railroad corporation in this State, and shall estimate therefrom the fair cash valuation of all of said shares, constituting the capital stock of such corporation on the first day of April next preceding, which shall be taken as the true value of its corporate franchise for the purposes of this act. From this valuation shall be deducted the value of the real estate and other property

of the corporation which is actually subjected to local taxation, as ascertained from the returns or otherwise; and in the case of railroad companies the lines of which extend beyond the limits of this State, there shall also be deducted such portion of the whole valuation of their capital stock ascertained as aforesaid, as is proportional to the length of that part of their lines lying without the State.

SECT. 3. Every railroad corporation embraced in section one of this act, shall annually pay a tax of one and one-half per cent. upon its corporate franchise, as determined in the preceding section. Such tax shall be assessed by the Governor and Council on or before the first day of May of each year; and upon such assessment being made, the Secretary of State shall certify the same to the State Treasurer, who shall thereupon notify the several Companies thereof, and the tax so assessed shall be in lieu of all taxes on shares in the said railroad corporation as heretofore required by law, and no tax shall be assessed by municipal authorities on any shares therein for municipal or other purposes. Said tax to be paid, one-half on or before the first day of July then next, and one-half on or before the first day of January then next. Any corporation neglecting to make returns according to provisions of this act, shall forfeit fifty dollars per day for every day's neglect so to do, to be recovered by an action of debt, brought in the name of the State; and in case of such neglect, the Governor and Council shall proceed to make the assessment of tax prescribed herein, on such valuation as they may think just, with such evidence as they may be able to obtain; and from such assessment there shall exist no right of appeal on the part of the company failing to make the returns as aforesaid. And if any corporation fails to pay the tax required by this act, the State Treasurer may forthwith commence an action of contract, in the name of the State, for the recovery of the same with interest.

SECT. 4. When such tax is paid, it shall be the duty of the State Treasurer to credit to each town in which shareholders resided on the first day of April preceding, such proportion of said tax as the number of shares owned in said town bears to the whole number thereof, the remainder to be retained for the use of the State.

SECT. 5. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, and this act shall take effect when approved.

Approved March 4, 1874.

B.

LAWS OF 1876, CHAPTER 115.

An Act to provide further remedies for the collection of State Taxes upon Corporations.

SECT. 1. In addition to any remedies now provided by law for the collection of State taxes upon any corporation, such taxes may be recovered by an action of debt, or an action on the case, in the name of the State, which action may be brought in any County where such corporation has its place of business, or where the action is against a railroad corporation, in any County where such railroad corporation owns or operates any railroad line or track.

SECT. 2. The remedies provided by this act may be used for the collection of any such tax heretofore assessed.

SECT. 3. This act shall take effect when approved.

Approved Feb. 22, 1876.

C.

LAWS OF 1857, CHAPTER 57.

An Act providing for the foreclosure of certain mortages given to secure the payment of bonds and coupons issued by railroad corporations.

Be it enacted, &c. SECT. 5. If the foreclosure of the mortgage be effectuated, it shall enure to the benefit of all

the holders of bonds and coupons provided for in its condition. And they, their assigns and successors, are hereby constituted a company, incorporated and chartered as of the day of the foreclosure, for all the purposes of the original company, with all the chartered and legal rights and immunities which pertained to the original company at the time of the foreclosure; and it shall be the duty of trustees, by suitable deed of release, to convey to such new company all the rights and interest by them held in said railroad, appurtenances and franchise, and other property, by virtue of their deed of trust and the foreclosure thereof, and if they neglect or refuse so to do, the court, upon application in equity, shall have power to compel them so to do, and upon such conveyance the said trustees shall be discharged of their trust.

SECT. 6. This new corporation, though a distinct one, may, for the calling of its first meeting, retain the same name with the old one; but shall at that meeting adopt a new corporate name, such as it shall choose to take, by which name it shall always afterwards be known. Its first meeting may be called in the same manner as was authorized for calling the first meeting of the original company. And the new corporation shall have full right to take and retain the possession and use of the mortgaged property, notwithstanding the pendency of any bill in equity to redeem.

SECT. 8. The original corporation shall continue in existence for the sole purpose of collecting and paying its debts, and bringing its unsettled matters to a close. The foreclosure of the mortgage and consequent transfer of the mortgaged property, as above provided for, shall not impair the rights of recovery against the corporation or its stockholders, which any person may have, either on contract or other cause of action. But in suits founded upon any of the bonds or coupons, secured by the foreclosed mortgage, the actual value

of the proportionate part of the property, which passed by the foreclosure, shall be deducted.

Approved April 15, 1857.

D.

Laws of 1864, Chapter 238.

An Act additional to "an Act to secure the safety and convenience of travelers on railroads, passed in the year one thousand eight hundred and fifty-eight.

Be it enacted, &c. Sect. 4. Every railroad corporation that shall be formed by the foreclosure of a mortgage of any railroad heretofore or hereafter made, shall be subject to such laws as the Legislature have enacted or shall hereafter enact concerning railroads, anything in the original charter to the contrary notwithstanding.

Approved March 16, 1864.

E.

Laws of 1864, Chapter 265.

An Act relating to the redemption of railroad mortgages by subsequent mortgages, and for the better protection of bondholders.

Be it enacted, &c. Sect. 6. All persons who have contributed or shall hereafter contribute to the payment of any prior mortgage in pursuance of the provisions of this act, shall have the right to organize and form a new corporation, with such name as they may designate, to be certified by the president and secretary of such new corporation to the Secretary of State; and shall have and enjoy all the rights

and privileges which are provided by law, or which would attach to the bondholders or other persons holding claims secured by such prior mortgage, if the same had been foreclosed without any payment or redemption thereof; *provided, however*, that the said rights and privileges, and also the chartered rights and immunities conferred upon the holders of bonds secured by a mortgage of a railroad and its franchise, upon a foreclosure thereof, under the provisions of Chapter Fifty-one of the Revised Statutes, shall be liable at any time to be amended, altered or repealed, at the pleasure of the Legislature.

Approved March 25, 1864.

F.

Laws of 1873, Chapter 383.

An Act for the consolidation of certain railroads.

Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows:

Sect. 1. The Portland and Kennebec, the Somerset and Kennebec, the Androscoggin, and the Leeds and Farmington Railroad Companies, whose roads are now leased to and operated by the Maine Central Railroad Company, are hereby authorized to consolidate said companies, or such of them as elect so to do, with the Maine Central Railroad Company into one corporation, upon the principles, in the manner, and upon the terms and conditions, so far as the same may be applicable, of the act of April *one*, eighteen hundred and fifty-six, entitled "An Act to authorize the consolidation of certain railroad corporations," under which the Penobscot and Kennebec, and the Androscoggin and Kennebec have become consolidated.

SECT. 2. No suit, action, or other proceeding now pending before any court or tribunal, in which any railroad company that may be so consolidated is a party, shall be deemed to have abated or discontinued, by reason of any such agreement of consolidation; but the same may be prosecuted to final judgment in the same manner as if the said corporation had not entered into such agreement of consolidation, provided that the existing rights of stockholders to any of their lines shall not be impaired, and that this act shall not apply to any pending suit.

SECT. 3. This act shall take effect when approved.

Approved February 26, 1873.

BERRY, PRINTER, PORTLAND.